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IN THE

Supreme Court of the United States,

October Term, 1895.

No. 462.

COUNT JOSEPH TELFENER,

Plaintiff in Error,

against

GEORGE W. RUSS,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR ON REHEARING.

ANDREW WESLEY KENT,
Of Counsel.

Supreme Court of the United States,

OCTOBER TERM, 1895.

No. 462.

COUNT JOSEPH TELFENER,
Plaintiff in Error,

AGAINST

GEORGE W. RUSS,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR ON REHEARING.

Statement of the Case.

I.

This action was brought in the district court of Travis county, Texas. It was removed therefrom to the circuit court of the United States for the western district of Texas and therein tried. After judgment, it was taken to the court of appeals for the fifth circuit, by writ of error, and after decision therein, was removed to this court, on a writ of *certiorari*, October 19th, 1894.

The case has already been before this court, first on a former review (145 U. S., 522) and again at the last term, when the present record was submitted

and the case argued; but no decision was rendered, and a rehearing was ordered by the court.

II.

The defendant in error seeks to recover damages against the plaintiff in error, because of an alleged breach by him of a contract to purchase from the defendant in error an alleged interest which he claimed to possess in certain public lands situated in Texas. The facts disclosed by the printed record may be stated briefly:—

III.

In 1882, anterior to October 25th (fol. 46), one Westcott, assuming to represent the plaintiff in error, was negotiating with one Baccarisse to secure control of public lands in Texas. Early in October, presumably while these negotiations were in progress, the defendant in error made application under the statutes of Texas to the state authorities to purchase one million, one hundred and sixty thousand, three hundred and twenty acres of public land (fols. 3 and 49–50).

IV.

The statutes so far as they have any bearing upon this case are as follows:

"Sec. 2. That any person, firm or corporation desiring to purchase any of the unappropriated lands herein set apart and reserved for sale, may do so by causing the tract or tracts which such person, firm or corporation desire to purchase, to be surveyed by the authorized public surveyor of the county or district in which said land is situated.

"Sec. 3. It shall be the duty of the surveyor, to whom application is made by responsible parties, to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey, to certify to, record and map the field notes of said survey; and he shall also, within the said sixty days, return to and file the same in the general land office, as required by law in other cases."

"Sec. 5. Within sixty days after the return to and filing in the general land office of the surveyor's certificate, map and field notes of the land desired to be purchased, it shall be the right of the person, firm or corporation who has had the same surveyed to pay or cause to be paid into the treasury of the state the purchase money therefor at the rate of fifty cents per acre, and upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for such purchase money, said commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so surveyed and paid for."

"Sec. 7. It shall be the duty of the commissioner of the general land office to give such general and specific instructions to surveyors in relation to the surveying of the public lands under the provisions of this act as may best subserve the interests of the state and carry into force and effect the intent and purposes of this act.

"Sec. 8. After the survey of any of the public domain authorized by this act, it shall not be lawful for any person to file or locate upon the land so surveyed, and such file or location shall be utterly null and void.

"Sec. 9. Should any applicant for the purchase of public land fail, refuse or neglect to pay for the same at the rate of fifty cents per acre within the time prescribed in section 5 of this act, he shall forfeit all right thereto and shall not thereafter be allowed to purchase the same, but the land so surveyed may be sold by the commissioner of the general land office to any other person, firm or corporation who shall pay into the treasury the purchase money therefor" (Act of July 14th, 1879).

V.

The defendant in error claims that between the 20th day of October and the 9th day of November, 1882, a period of twenty days, the one million, one hundred and sixty thousand, three hundred and twenty acres were physically surveyed; and, strange as it may seem, the record of the land office appears to support this remarkable claim (fols. 50-51).

The plaintiff in error shows that these surveys were not actual—not field, but office surveys (fols.

55–57); and that none of the field notes, except those covering fifteen thousand, three hundred and sixty acres, were filed in the land office within the time required by the statutes (fols. 13 and 50–51).

It is conceded that sixty-two thousand, seven hundred and twenty acres were not surveyed in any manner until *after* the first day of November, 1882 (fol. 51). However, on that day, Baccarisse, assuming to act for the plaintiff in error, under authority claimed to have been conferred upon him by Westcott, entered into a contract in writing with defendant in error (fol. 2 and Exhibit M, fol. 15); and it is for the alleged breach of this contract, on the part of the plaintiff in error, that this action is brought.

VI.

The Contract.

This instrument bears date November 1st, 1882, and recites the filing of the application by Russ, and the desire of Telfener to purchase Russ's interest thereunder; provided, that under the law it entitled him to become a purchaser of the lands; and in such case Telfener agrees to pay Russ, in consideration of the sale and transfer of all his rights, twenty-five cents for every acre covered by the application; and after verifying the regularity of the application and the number of acres covered thereby, to make the payments; whereupon Russ agrees to convey to Telfener "all and singular the rights, titles and interests that the said Russ now has or may be entitled to in and to said lands by reason of such application," and warrants against all claims thereto through or under *him*, but not anybody else.

The instrument further provides for inspection of the records, and verification of the number of acres, before November 15th—in fourteen days; and that there shall be no delay thereafter on Telfener's part in making payment of the purchase money.

The contract was signed by Russ in person and on the part of Telfener by "C. Baccarisse, Ag't."

It appears that Telfener failed to make the payments provided for in the contract, or to discharge any of the obligations which Baccarisse had thus undertaken in his behalf.

VII

In June, 1883, the defendant in error began this action to recover the contract price of the lands; the twenty-five cents per acre, *i. e.*, two hundred and ninety thousand and eighty dollars.

There is before us no record of the first trial which took place in the circuit court, to which court the case had been removed; but it appears from the report of the case determined in this court, that a verdict was rendered in favor of the defendant in error. The judgment based upon this verdict was reversed by this court because of an error in assessing the damages—the court passing upon no other question. The case was again tried in the circuit court, sitting at Austin, where judgment was rendered on the 11th day of June, 1893, in favor of the defendant in error, for five hundred and eighteen thousand, four hundred and forty and $\frac{50}{100}$ dollars.

VIII.

The plaintiff in error contends:

(1.) That the contract was not binding upon him because Baccarisse had no authority to execute it.

(2.) That the interest which the defendant in error undertook to sell by said contract was non-assignable.

(3.) That defendant in error acquired no right by virtue of his application.

(4.) That the right claimed by the defendant in error under his applications was not a vested right on November 1st, 1882, in or to any lands surveyed after that date.

(5.) That inasmuch as the law required the field notes to be filed in the land office within sixty days

after survey; and it appearing that notes covering only fifteen thousand, three hundred and sixty acres had been so filed, defendant in error's right of recovery, in any event, was limited accordingly; and

(6.) That inasmuch as the law required the surveys to be actual and made on the ground, and it appearing that the alleged surveys were not so made, they were void and defendant in error acquired no interest whatever in the premises, and hence there was no consideration.

IX.

The first proposition, involving the power of Baccarisse to make the contract, was practically disposed of by the verdict, if the instructions to the jury were correct.

The learned court charged the jury:

"If you find from the evidence that Baccarisse had authority from the defendant or from Westcott with the defendant's assent, approval and knowledge, to contract with individuals generally for the purpose of procuring lands under the act of the legislature of 1879, by filing upon them and having them surveyed, then you are instructed that the acts of Baccarisse were binding upon the defendant, as such acts came within the scope of his authority, and defendant cannot avoid liability thus created" (fols. 29, 48).

Plaintiff in error took exception to this part of the charge, which exception is made the second assignment of error in the court of appeals (fol. 62).

The remaining propositions involve the questions, first, whether the interest which the defendant in error undertook to sell was assignable or not; second, whether or not the defendant in error had any actual interest in the land, or any right thereto, when the contract was made; and third, whether or not a subsequently acquired right in a part of the land is sufficient to uphold the judgment. These propositions

constitute the main grounds upon which the plaintiff in error relies for a reversal of the judgment, and will now be considered.

First.

The interest which the defendant in error undertook to sell to the plaintiff in error was not assignable.

(*a.*) THE STATUTES CONTAIN NO PROVISION FOR THE TRANSFER OF ANY INTEREST THEREUNDER; NOR DOES THE STATE EITHER EXPRESSLY OR IMPLIEDLY RECOGNIZE THE RIGHT OF ASSIGNMENT.

The act under consideration was in effect an offer on the part of the state of Texas to sell land, the acceptance of which constituted a contract which could not be impaired by subsequent legislation (Jumbo Cattle Co. *v.* Bacon, 79 Texas, 5). The terms of the contract are expressed in the statutes which do not confer upon the applicant the right to transfer his interest or authorize a contract between his assignee and the state; on the contrary, the whole act clearly indicates that all rights conferred by the state are centered in the applicant.

The rules of interpretation of contracts between the state and individuals or corporations are well settled.

The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises or privileges in which the government or the public has an interest (Coosaw Mining Co. *v.* South Carolina, 144 U. S., 550–562, and cases therein cited). Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld. Nothing passes by mere implication (*Id.*).

This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealings with legislative bodies (Slidell *v.* Grandjean, 111 U. S., 412–438).

Where, however, the meaning of the statute is plain, it is the duty of the courts to construe it according to its obvious terms (United States *v.* Wiltberger, 5 Wheat., 76).

The purposes of the act under which a contract is made may also enter into its interpretation. This principle is illustrated by the cases of Winona & St. Peter R. R. Co. *v.* Barney (112 U. S., 618), and United States *v.* Denver, &c., Ry. Co. (150 U. S., 1), which involved the construction of acts of congress in aid of railways. In the former case, where the lands granted were imperfectly described, the court held that resort must be had to the condition of the country and the purposes of the acts to determine their intent. In the latter case the court held that for the purposes of the act, a grant of timber for building a "railroad" should be extended so as to include certain structures as a part of the railroad.

The prevailing rule is clearly expressed by this court in the case last cited. There Mr. Justice Jackson says:

> "It is undoubtedly, as urged by the plaintiff in error, the well settled rule of this court that public grants are construed strictly against the grantees; but they are not to be construed so as to defeat the intent of the legislature or to withhold what is given either expressly or by necessary or fair implication" (p. 14).

We are here considering an executory contract between the state and an individual, and the question is whether the state, in the absence of any provision for the assignment of an interest acquired by the individual, is bound to recognize his assignee.

The rules stated do not permit the statutes to be extended by implication, unless the implication necessarily flows from the language used; and it must be conceded that the right of assignment is not necessary to make effective the purposes of the act.

However, if there be any doubt as to the proper construction of the statute, then that construction must be adopted which is most advantageous to the interests of the state. Hannibal, &c., R. R. Co. *v.* Packet Co. (125 U. S., p. 271).

It is well to remember, in considering this question, the sovereignty of the state which exempts it from all liability, but that expressed in its obligation. The state defines its own liability and the limits within which it may be held. For example: the question has several times arisen whether a state is chargeable with interest on its debts after they mature, and this court has held that interest will not be allowed against a state without its consent manifested by an act of its legislature, or by a lawful contract of its executive officers; and this decision is based upon the sovereignty of the state (United States *vs.* North Carolina, 136 U. S., 211–216, citing United States *v.* Sherman, 98 U. S., 565; Angarica *v.* Bayard, 127 U. S., 251–260, and *In re* Grosman, 17 Ch. D., 771). What is the difference in principle between the obligation of a debtor to pay interest on an overdue debt, and his obligation to recognize his creditors' assignee? The obligation is in each case implied, and imposes an additional burden. If the former is not an obligation of sovereignty why should the latter be? Certainly, if the sovereignty of a state exempts it from the one, it must also from the other.

It would seem to be clear, therefore, that there can be no valid assignment of any interest acquired by the applicant under the statutes in question, without the consent of the state.

(*b.*) THE INTEREST WHICH THE DEFENDANT IN ERROR UNDERTOOK TO SELL TO THE PLAINTIFF IN ERROR WAS A PERSONAL PRIVILEGE.

The statutes indicate clearly that until the land is paid for and the patent issued, any privileges conferred by the acts are personal to the applicant. The statutes provide that any person may purchase the land by causing it to be surveyed, at the same time requiring the surveyor to survey it for the *applicant* and to file the field notes in the land office. After the filing in the general land office of the field notes, etc., the statutes declare that it shall be the "right of *the* person" who had the land surveyed to pay the purchase money, and thereupon the commissioner "shall issue to *said* person a patent accordingly."

The state official can therefore issue the patent only to the *applicant*, because the survey can be made only for *him*, and to *him* only is given the right to buy. The statutes further provide that should "an applicant for the purchase of public land" fail to pay the purchase money, "*he* shall forfeit all right" to the land and "shall not thereafter be allowed to purchase the same."

The question, then, put into practical form, is whether the assignee of whatever rights an applicant acquires under an application, made by virtue of the statutes, could, on tender of the purchase money to the commissioner, compel the issue to him of a patent. We think the issue of such a patent could not be so enforced for the reason that the statutes do not warrant the issue of a patent to any person but the applicant, for whom alone the survey can be made, and who alone has the right to pay the purchase money. This view is supported by the case of Campbell *v.* Blanchard (2 Posey Unreported Cases, 321), wherein it is held, under this very act, that a mandamus will not issue to compel a public officer to perform an act unless it be clearly defined and enjoiued by law so that it does not in-

volve the exercise of discretion (see also cases there cited).

The courts of Texas have not passed upon the question under consideration, so we may properly notice the construction given somewhat similar statutes by other judicial authority. The desert land act and the timber culture act (both acts of Congress), are somewhat like those in question. The desert land act (March 3, 1877, 19 Stat. L., 377), provides that "it shall be lawful for any citizen of the United States * * * upon payment of twenty-five cents per acre, to file a declaration, under oath, with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same within the period of three years thereafter." It further provides that "at any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land * * * and upon the payment to the receiver of the additional sum of one dollar per acre * * * a patent for the same shall be issued to him."

This act does not in terms prohibit the assignment of entries made under it before final proof. The land department, however, in the case of S. W. Downey (Copp's Public Land Laws, 1882, Vol. 2, p. 1381), decided that under this act such assignments were illegal. In that case certain persons having made desert land entries in the territory of Wyoming attempted to assign the same to other parties for a valuable consideration. Secretary Schurz says:

"I think that there can be no doubt that the claims were not assignable. The law by which the entries were allowed to be made treats them as the claims of the party making the entry. If proof is made showing a compliance with law 'a patent for the same shall be issued to him.' The claims not being assignable, no rights passed to the purchaser when the assignment was made."

This ruling was approved later by Secretary Teller in the case of D. B. Dole (3 L. D., 214).

The timber culture act (June 14, 1878, 20 Stat. L., 113), provides that "any person * * * who shall plant, protect and keep in a healthy, growing condition for eight years, ten acres of timber on any quarter section of any of the public lands of the United States, * * * shall be entitled to a patent for the whole of said quarter section, * * * at the expiration of said eight years, on making proof of such fact by not less than two credible witnesses, and a full compliance of the further conditions as provided in section two."

Section two provides for the filing of an affidavit by the applicant to the effect that he is a citizen; that the land specified in his application is prairie land, or other land devoid of timber; that the entry is made for the cultivation of timber and for his own exclusive use and benefit, and not for the purpose of speculation, nor for the use or benefit of any other person; and that he intends to hold and cultivate the land, and to fully comply with the provisions of the act. This section also provides for the breaking and planting of the land, and the payment of certain moneys therefor to the government.

The case of Palmer *vs.* Stillman (18 L. D., 196) arose under this act. Stillman made a timber culture entry, and sold the same to one Wilson before he had lived upon the land long enough to be able to make final proof. The department held that the case most nearly analogous to this was Klock *v.* Husted (2 L. D., 329), and said:

"In the case of Klock *vs.* Husted, the question whether the alienation of the entry was sufficient cause for cancellation was brought directly in issue, as in the case at bar, by having been explicitly charged in the affidavit of contest. As in the case at bar, the evidence showed an agreement to sell and convey executed after entry. Referring to the timber culture acts of March 13, 1874, and June 14, 1878,

the department said: 'Neither of the acts contains, in terms, the provisions of the pre-emption law that one claiming under that law shall not make any agreement or contract by which the title he may acquire shall inure to the benefit of any person except himself, but the tenor and spirit of both are to that effect; and as a timber culture entry is not assignable, whenever it appears that the entryman has sold the land, or holds it for another * * * he is no longer a legal or an equitable beneficiary of the government, because he violates the conditions upon which his entry was allowed, and under which only it can be maintained. * * * Husted appears to have turned over to Hutchinson his entire interest in the land excepting his right of re-entry upon Hutchinson's failure to meet his obligations under their agreement, otherwise it was an absolute sale (or agreement to sell) of all his rights under his entry so far as he could effect a transaction of that nature. He did nothing nor caused anything to be done in his own behalf during the years 1878, 1879, 1880 or 1881, relative to the planting and cultivation of trees, but left that whole matter to Hutchinson to be performed by him in his own (Hutchinson's) behalf. * * * On these facts I am of opinion that Husted abandoned the land from the fall of 1877 to the spring of 1882, with intent during that time to convey it to Hutchinson, for whose use and benefit he held his entry, upon his acquisition of title.'

"By the above decision, which has never been overruled or departed from, the department has definitely settled the question that such a contract as that made in the case at bar amounts to an abandonment of a timber culture entry by the party executing the contract, and defeats his claim."

(*c.*) THE POLICY OF THE LAW IS TO DENY THE RIGHT TO ASSIGN INTERESTS HELD UNDER EXECUTORY CONTRACTS WITH THE STATE.

Whenever rights are acquired by individuals against the federal government, it is the declared policy of the law to discourage their transfer; for instance, the transfer of government debts is recognized only when unusual formalities are observed (U. S. Rev. Stat., sec. 3477); transfers of govern-

ment contracts cause their annulment (sec. 3737); all transfers of pensions are void (sec. 4745); all transfers of officers' pay are void (sec. 1291); all transfers of mail contracts and all transfers of Indian contracts are void without the consent of the government (20 Stat. L., 61, and R. S., sec. 2106). All rights secured by the pre-emption of lands are declared to be non-assignable until after the issue of the patent (sec. 2263).

The spirit of the law is to exclude new interests; to prevent the introduction of new elements; in short, to maintain the primary relation.

The reason of the rule laid down by this court is, "that the government might not be harassed by multiplying the numbers of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made." Hobbs *v.* McLean (117 U. S., 576).

The power of alienation is never presumed until the rights between the individual and the state are finally determined—until they ripen into executed obligations. Even then, this power is usually expressed, as, for example, in the statutes governing military bounty land warrants (sec. 2436), and the statutes governing the pre-emption of lands (sec. 2263).

This policy has been applied to county and municipal contracts by the state courts, and the principle has been recognized by this court.

The supreme court of Indiana, in the case of Park Commissioners *vs.* O'Connor (86 Ind., 531), declared that a county cannot be charged by process in the nature of garnishment or foreign attachment for the debts of its creditors to third persons, and the reason assigned in each class of cases is that it would be contrary to public policy that a county should be involved in controversies and litigations between its contractors and their creditors.

The supreme court of Pennsylvania in the case of Philadelphia's appeal (86 Penn. St., 179–182), where

a contractor for building a bridge assigned all his interest in the contract "except the item of superstructure," to one who had expended money upon the bridge, held that such a partial assignment of the contract though notified to the city did not make it liable to the assignee, because "the policy of the law is against permitting individuals, by their private contracts, to embarrass the financial affairs of a municipality." (See also Giest's appeal, 104 *Id.*, 351-4.)

This court in the case of Delaware County *vs.* Diebold Safe Co. (133 U. S., 473), recognizes the principle laid down in the two cases cited, Mr. Justice Gray using the following language:

"It thus appears that the supreme court of Pennsylvania has taken the same view as the supreme court of Indiana, as already shown, holding it to be against public policy to permit municipal corporations, in the administration of their affairs relating to the construction of public works, to be embarrassed by sub-contracts between their contractors and third persons, to which they have never assented" (p. 495).

This court considered the question of assignability, on the former review of this case, and said:

"It will be seen that an applicant, under the laws of Texas, for the purchase of a portion of its unappropriated lands, could acquire no vested interest in the land applied for, that is, no legal title to it, until the purchase price was paid and the patent of the state was issued to him. If the price was not paid within sixty days after the return to the general land office of a map of the land desired and the field notes of its survey, he forfeited all right to the land, and was not thereafter allowed to purchase it. He had, however, the right to complete the purchase and secure a patent within the prescribed period, after the map and field notes of the survey were filed in the general land office, which is designated in the decisions of the supreme court of the state as a vested right that could not be defeated by subsequent legislation. *Whether this vested right for the limited period prescribed was assignable to others without the consent of the state authorities, neither*

the statutes of the state nor the decisions of its courts inform us definitely. It would seem that *if* a right to purchase land for however short a period is *vested* in one, it is a valuable right, and is, in that sense, property, and in the absence of express prohibition would be therefore assignable. Such is apparently the import of language used by the supreme court of the state in some of its decisions (White *v.* Martin, 66 Texas, 340; Jumbo Cattle Co. *v.* Bacon, 79 Texas, 5). * * *

"We will not, however, rest our decision upon the assignability of the right to purchase alleged to have been thus made, *without the assent of the state authorities*, as there is another and clear ground for the disposition of the case. * * *

"*Assuming* that the plaintiff had acquired a vested right to complete the proceedings for the purchase of the land desired, and to secure a patent for it, *and that such right was not personal to him but was transferable to another without the assent of the state authorities*, he did not show that he had suffered any damages by the failure of the defendant to comply with the contract for the right to purchase the land."†

Second.

The interest which the defendant in error undertook to sell to the plaintiff in error was an interest, acquired under the statutes, in the whole body of land described in the application.

It is evident that the defendant in error undertook by his contract to sell to the plaintiff in error the right to purchase the whole tract; the right which defendant in error claimed to possess by virtue of his application. The complaint charges:

That "plaintiff was the sole owner of a certain valuable, valid and transferable interest in the *whole* of

† The italics are ours.

a *certain* body of land, containing, as subsequently ascertained by lawful survey, 1,813 tracts of 640 acres each, being in the aggregate 1,160,320 acres" (fol. 2).

The contract points to a definite body or tract, namely, that described in the application, nothing more, nothing less. It contains no provision for the purchase or sale of less than this whole body of land, nor for the purchase or sale of any interest in a part. It contains no such clause, for instance, as that embodied in the contract considered in the case of Clark *v.* Reed (158 U. S. 506), which provided that "said sale of land is a sale by the acre and not by the gross." We submit, therefore, that the contract was based upon the whole tract as an entirety, and that an apportionment was not contemplated and is not permissible; in short, that the contract is entire and not separable.

The entirety of a contract is not destroyed by the circumstance that the subject of the sale is of such uniform character as to be readily divisible proportionally by weight or measure, or is contained in packages of uniform quantity and value, even with the added circumstance that the consideration is named only by way of fixing the rate or price of the unit of such division (Mansfield *v.* Trigg, 113 Mass., 350).

Third.

The interest which the defendant in error undertook to sell to the plaintiff in error, was an interest vested in the defendant in error, by virtue of his application, on the first day of November, 1882.

The defendant in error claimed to be the sole owner of a certain interest in the lands described in his application, on the *first day of November*, 1882,

and by his contract undertook to sell that interest to plaintiff in error; and it is that interest, whatever it may be, that is the subject of this controversy. The language of the contract is:

"All and singular the rights, titles and interests that the said Russ now has or may be entitled to in and to said lands by reason of such application" (fol. 17).

That is to say, *not* the interests which he then or might *thereafter* become entitled to, but the interest which he *then* had or was *then* entitled to. We are stating complainant's own contention. For instance, in his complaint he charges:

That "on the *first day of November*, 1882, plaintiff was the sole owner of a certain valuable, valid and transferable interest in the whole of a certain body of land."

The defendant in error must stand or fall by this allegation.

The contract fixed the 15th day of November, 1882, as the date limiting the time within which the records might be inspected, the files authenticated, the acreage ascertained, and the consideration paid; but that date was not fixed for any other purpose.

Fourth.

The defendant in error never at any time acquired an interest under the statutes in the whole body of land.

The act under which defendant in error claims to have acquired an interest in the land, or some right thereto, was passed by the legislature of Texas on the 14th day of July, 1879, and is entitled: "An act to provide for the sale of a portion of the unappropriated public lands." It was amended by an act passed March 11th, 1881, which extended its provisions to additional territory. The stat-

utes in substance provide that any person may purchase the land by causing it to be surveyed by the public surveyor (sec. 2), who shall make the survey within three months; and within sixty days after the survey, file the field notes and other evidences of the survey in the land office (sec. 3); that within sixty days thereafter "it shall be the right of the person" who had the land surveyed to pay the purchase price, *i. e.*, fifty cents per acre, and receive a patent (sec. 5), and if the applicant fail to pay for the land within sixty days after the filing of the field notes "he shall forfeit all right thereto" (sec. 9). The defendant in error made application for a survey of specified lands under this act on the 4th and 5th days of October, 1882 (fol. 50).

(*a.*) AN APPLICATION FOR A SURVEY MADE UNDER THE STATUTES CONFERS NO RIGHT UPON THE APPLICANT.

It is evident that the application confers no right upon anybody. It is simply a request for a survey and *per se* gives the applicant no interest in the land nor any right thereto. Notwithstanding this application, any other person might acquire a right to purchase the same land, by causing it to be surveyed. Until the lands were surveyed, at the instance of the applicant, any one might make a like application—acquire the same status as defendant in error; or, what is more important, any person might locate on the land (sec. 8), because it was open to pre emption as well as sale. It is clear, therefore, that the filing of an application *per se* confers no right upon the applicant, nor gives him any interest in the land. The courts of Texas have so construed the statutes. It was held in the case of Campbell *v.* Blanchard (2 Posey's Unreported Cases, 321), that persons who have done nothing more than to make applications for surveys, had no vested right in the land which they sought to purchase; and this rule was adopted in The State *v.*

Work (63 Texas, 148), and in White *v.* Martin (66 Texas, 340).

(*b.*) IT IS ONLY WHEN THE SURVEY AUTHORIZED BY THE STATUTES IS MADE, THAT A RIGHT IS VESTED IN THE APPLICANT.

In the case of White *v.* Martin (*supra*), the court says:

"How may the applicant become a purchaser? The statute answers the question. He 'may do so by causing the tract or tracts which such person, firm or corporation desires to purchase to be surveyed.' When this is done *as the act contemplates*, then, and not before, the state contracts, upon the purchaser's complying with the other requirements of the act, that it will convey to him the land surveyed. When this point was reached there existed an executory contract which gave the purchaser a vested right, upon complying with his part of the contract, to have the land purchased."

This construction of the statute is adopted in the case of Jumbo Cattle Co. *v.* Bacon (79 Texas, 5), and is upheld also by this court, (Campbell *v.* Wade, 132 U. S., 37), so that the law on this point must be regarded as settled.

It is unnecessary to consider under this point what steps are necessary to complete the survey, or what constitutes the survey "authorized by the act," since no attempt was made to survey the *whole* body of land in any manner.

(*c.*) NO SURVEY OF THE WHOLE BODY OF LAND HAD BEEN MADE, OR IN ANY MANNER ATTEMPTED, ON THE FIRST DAY OF NOVEMBER, 1882.

No attempt was made to survey the entire tract until after November 1st, 1882. The defendant in error admits that but 1,097,600 acres were surveyed up to and including the first day of November, 1882 (fols. 34 and 51 and p. 51); in other words, that at the time of the execution of the contract, 82,720 acres were unsurveyed. No attempt had been made to survey this vast tract of land; therefore, under the

provisions of the statutes, and by the adjudication of the courts, the defendant in error was *not*, "*on the first day of November*, 1882, * * * the sole owner of a certain valuable, valid and transferable interest in the *whole* of a *certain body* of land, containing, as subsequently ascertained by lawful survey, 1,813 tracts of land of 640 acres each, being in the aggregate 1,160,320 acres"; but, on the contrary, the defendant in error, on the first day of November, 1882, possessed no interest in the whole body of land; and the contract being entire, and not separable, there was a total failure of consideration.

In Chanter *v.* Leese, the exchequer chamber, in the case of a sale of six patents for one consideration, five of which were valid and one void, held that there had been an entire failure of consideration, on the ground that the money payable had not been apportioned by the contract to the different parts of the consideration, and the patents had not been enjoyed in part by the buyer. "We see, therefore, that the consideration is entire and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which, being entire, by failing partially fails entirely; and it follows that no action can be maintained for the money."

Benjamin on Sales, section 501.

Fifth.

The defendant in error never acquired an interest under the statutes in any of the lands, because the same were not surveyed on the ground, as required by law.

The statutes provide that the applicant must cause the lands to be surveyed by the public surveyor (sec. 2), and that the survey must be made within three months from the date of the application. The answer filed by the plaintiff in error alleges that the lands described in the complaint

were never actually surveyed—not surveyed on the ground; that the "field notes" were made in the surveyor's office, and hence that the surveys made were in fact no surveys at all (fols. 25 and 26). It is claimed that 1,160,320 acres were surveyed between October 13th and November 9th; that is to say, 1,813 sections, an average of about 65 sections a day.

The returns show that on October 13th, 76 sections were surveyed; October 16th, 46; October 18th, 36; October 19th, 18; October 20th, 30; October 21st, 59; October 22d, 114; October 23d, 98; October 24th, 79; October 25th, 22; October 26th, 14; October 27th, 208; October 28th, 78; October 29th, 36; October 30th, 170; October 31st, 215; and on November 1st, the date of the contract, 97. The official surveyor was dead when the case was tried (fol. 54). The only surveyor examined was Mr. Maddox, a witness called by plaintiff in error and his testimony remains uncontradicted. He testified that a section is four miles around; that one man could survey on an average not more than from ten to fifteen miles a day (fol. 55). The witness once surveyed twenty-eight miles of prairie country on one day, but rode horseback, had six flagmen, never stopped to build a corner and worked from sun up to sun down (fol. 55). The agent of the defendant in error, Mr. Duncan, who made the contract for the surveys, testified that between twenty and thirty people were employed in the work, and although he was himself one of the party, he was unable to state by whom any section was surveyed (fol. 57).

It is evident that these lands were not actually surveyed. The work was rushed, it may be to meet the exigencies of the negotiations then pending between Wescott, Baccarrisse and the applicant, and apparently all for a record, to be made the basis of a contract. A single illustration will show the absurdity of our adversary's claim. According to the returns 215 sections were surveyed on October 31st, that is to say: 860 miles, and all done by twenty

or thirty persons. To do this (if there were thirty persons) each man must have been a surveyor, each must have travelled 28 miles, and each must have surveyed alone, without anybody's assistance. The mere statement suggests bad faith somewhere. The law requires actual surveys. The amendatory act of 1881 (sec. 6), provides that these lands shall be sold in *tracts of* 640 *acres each*, unless precluded by former surveys. It is not pretended that previous surveys of any of the lands in question were made; therefore, it must be concluded that it was obligatory on the surveyor to survey each section separately. On this point the court says, in the Jumbo cattle case (*supra*): "It was hardly practicable to designate each boundary of each section desired to be purchased without a survey."

The early practice of making surveys from data obtained otherwise than from actual work on the ground has been condemned by the courts. Horton *v.* Pace, 9 Texas, 84; Jenkins *v.* Chambers, *Id.*, 231; Jones *v.* Burgett, 46 *Id.*, 283; Stiles *v.* Gray, 10 *Id.*, 506; Tompson *v.* Railway Co., 69 *Id.*, 392 (4 S. W. Rep., 629).

The true method is set forth in Stafford *v.* King, (30 Texas, 257–269), where the court says:

"It is the duty of the surveyor to run round the land located and intended to be embraced by the survey and patent, and see that such objects are designated on it as will clearly point out and identify the locality and boundaries of the tract, and to extend a correct description of these objects (natural and artificial, with courses and distances), into the field notes of the survey, in order that they may be inserted in the patent, which will afford the owner, as well as other persons, the means of identifying the land that was in fact located and surveyed for the owner."

It appearing, then, that none of the lands were surveyed on the ground, as required by law, the defendant in error acquired no interest therein, under the statutes, and consequently there was a total failure of consideration.

Sixth.

Assuming the lands to have been surveyed on the ground, the defendant in error acquired no interest in 1,144,960 acres, because the field notes thereof were not filed as required by the statutes.

The defendant in error filed his application for a survey of the entire tract of land on the 4th and 5th days of October, 1882. The next step under the statutes was to have the lands surveyed. This the defendant in error claims was done. According to the record 1,144,960 acres were surveyed prior to November 4th, and the remaining 15,360 on the 9th day of November (fol. 51). The field notes of the 1,144,960 acres should, therefore, have been filed at least before January 4th, 1883, and the field notes of the 15,360 at least before January 9, 1883. As a matter of fact the field notes were all filed January 8, 1883, (fol. 13), too late to secure to the applicant, even then—two months after the contract was made—the right to purchase more than 15,360 acres of the tract bargained for, containing 1,160,320 acres.

That the filing of the field notes and other evidence of the survey, within the time specified by the statutes, is necessary to vest any interest in the applicant is shown by the statute itself.

The act expressly provides that it is only "after the return to and filing in the general land office of the surveyor's certificate, map and field notes of the land desired to be purchased" that a right is conferred which may be lost on failure to pay the purchase money within sixty days thereafter. The survey authorized by the act is not merely the taking of measurements, and from them making field notes and maps; but also the filing of these evidences in the land office. If the mere physical measurements, reduced to field notes and maps, constitute the survey contemplated by the statutes,

where is the public record of its existence, or the evidence of its completion? If the filing of the maps and field notes is but directory—a perfunctory act, the physical survey may be kept in an incomplete condition for an unlimited time, the payment postponed indefinitely, and thus the very purpose of the statutes be defeated. The statutes evidently contemplate a delivery of the evidences of the survey, so that a record may be created and notice given that the lands are under contract for the time being, *i. e.*, appropriated public lands.

We conclude, therefore, that no right vests in the applicant until the lands have been surveyed and the field notes and other papers filed in the land office as required by the act. This view of the statutes is supported by the decisions of the courts. Thus in White *v.* Martin (*supra*) the court says:

"If the act of July 14, 1879, be considered as a proposition made by the owner of land to sell to whomsoever might desire to buy, then it is certainly true that one desiring to become a purchaser would have to comply with the terms upon which the owner proposed to sell before he could acquire any right."

Again the court says:

"Until there is a purchase, there can be no right which the law recognizes. The application to buy or to have surveyed may be regular, the surveyor satisfied of the responsibility of the applicant, and ready to make the survey, but when this point has been reached, they have only arrived at that stage of the negotiation and discharge of duty by the surveyor which authorizes him to do the act which the law declares shall operate as a purchase. The surveyor then has the power, but until it is exercised by doing the very act which the law declares shall operate as a purchase, his will, combined with the will of the applicant, can no more operate as a sale or purchase, than can the willingness of an attorney acting under a power, which provides the manner in which it shall be exercised, coupled with the expressed desire of the purchaser to buy at fixed terms,

operate as a sale, until the sale is consummated by the exercise of the power in the mode and manner provided."

Again the court says:

"The survey was made for the appellees within the time prescribed by law, and thus was vested his right. The field notes were returned to the general land office within the time required by law, as was the full price for the land paid to the treasurer of the state.

"The law, *at the time the right vested*, declared that 'it shall be the right of the person, firm or corporation who has had the same surveyed, to pay, or cause to be paid, into the treasury of the state, the purchase money therefor, at the rate of fifty cents per acre and upon the presentation to the commissioner of the general land office of the receipt of the state treasurer for such purchase money, said commissioner shall issue to said person, firm or corporation a patent for the tract or tracts of land so surveyed and paid for.'

"The ninth section declares that if the applicant fails, refuses or neglects to pay for the land within the time prescribed, 'he shall forfeit all right thereto.'

"A right cannot be forfeited before it exists, hence we have the clear declaration in the statute that it is not the payment of the purchase money which vests the right to have the land, but that the right vests in the person who has had the survey made, which, however, may be lost by failure to comply with the other terms required of him."

This court has adopted a similar view of the statutes. In Campbell *v.* Wade (132 U. S., 37) the question arose whether the petitioner by his application for a survey had acquired a vested interest in the lands he desired to purchase. Mr. Justice Field, delivering the opinion of the court, says:

"It was contended in the state courts, and the contention is renewed here, that the petitioner, by his application for a survey, had acquired a vested interest in the lands he desired to purchase, which could not be impaired by their subsequent withdrawal from sale. This position is clearly untenable.

The application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right against the state. The application was to be followed by a survey, and the surveyor was allowed three months in which to make it. By the express terms of the act, it was only after the return and filing in the general land office of the surveyor's certificate, map and field notes of the survey, that the applicant acquired the right to purchase the land by paying the purchase money within sixty days thereafter. But for this declaration of the act, we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the state. Clearly, there was no such right in advance of the survey. The state was under no obligation to continue the law in force because of the application of any one to purchase. It entered into no such contract with the public. The application did not bind the applicant to proceed any further in the matter; nor, in the absence of other proceedings could it bind the state to sell the lands."

We submit, therefore, that the survey authorized by the act contemplated the filing of the field notes in the land office within the time provided by the statutes; and the field notes covering the alleged survey of 1,144,960 acres, not having been so filed, the applicant acquired no interest whatever.

Seventh.

The defendant in error having failed to secure any interest under the statutes in the 1,144,960 acres, there was a total failure of consideration and the contract became void.

The only interest which the defendant in error can in any event claim to have possessed in any of the lands, by virtue of the statutes, is the right acquired by filing the field notes.

This interest, however, was limited to 15,360 acres, less than one and one-half per cent. of the entire body of land. The contract clearly shows what the defendant in error by his pleading asserts, that the defendant in error claimed an interest in the whole of the 1,160,320 acres, and that the contract was entered into by defendant in error on that basis.

Assuming for a moment—what we do not admit—that an interest acquired after November 1st, 1882, might be made available by defendant in error, under the contract, the interest acquired covers so small a part of the entire body of land, that it cannot be considered in any sense a substantial interest within the meaning of the contract.

Eighth.

The condition of the contract was never fulfilled, hence the agreement to purchase failed.

The agreement between Russ and Telfener was entered into upon the express condition that the application had been regularly made and filed in such manner as to entitle Russ to become the purchaser of the lands from the state (fol. 15). The language of the contract is:

"And whereas the said Count Telfener is desirous of purchasing from said Russ all his rights, titles, and interest under and by reason of such application, *provided* it shall appear that such application has been regularly made and filed in such manner as will, under the terms of said law, entitle the said Russ to become the purchaser of the said lands from the state of Texas; and in such case has agreed and promised to pay to said Russ, as consideration of his sale, transfer, and assignment of all his said rights, titles, and interest, twenty-five cents per acre for each and every acre of land covered by said application."

The defendant in error, by the recitals in the contract, represented that he then possessed some right to, or interest in, the lands by reason of his application. The plaintiff in error had no knowledge on the subject; so the contract was conditioned upon the existence of that right or interest, and plaintiff in error was afforded an opportunity to ascertain the fact. This view is strengthened by the position taken by defendant in error, who, in pleading his cause of action, alleges that on the day the contract was made he had a valid and transferable interest in the land (fol. 2). Did he then have any interest in the lands? That is the question now before the court: not whether plaintiff in error might have been saved the trouble of filing the application; not whether plaintiff in error might have been saved the expense of making a survey; but whether defendant in error had, when he made the contract, an interest in the lands. The existence of the agreement to purchase turned on this fact, and when it was ascertained, the existence or non-existence of the agreement was determined.

We have already shown that the defendant in error was never at any time entitled to purchase the lands from the state. In fact, our adversaries admit that defendant in error had no right against the state. In their brief filed in October last (p. 13) they say:

"The assignment by Russ did not pass to Telfener either an absolute right to the land *or to the right to acquire it*, but it did pass a right to purchase the land as against every other person *than the state* or would-be pre-emptors."

We submit, therefore, that the defendant in error having failed to show that he had an interest in the lands when the contract was made, failed to establish any agreement to purchase.

Ninth.

There is nothing in the record to justify the conclusions of the court below.

The learned court of appeals considering the question whether the defendant had an interest in the lands shown by the returns to have been surveyed *after* November 1st, 1882, takes the ground that the defendant in error "agreed on the *15th* of November, 1882, to transfer and assign to defendant (plaintiff in error), all his right, title and interest in and to the land in question acquired by virtue of plaintiff's (defendant in error's) application." The learned court then assumes that the whole body of land was surveyed before that date, and consequently that defendant in error *had* an interest in the lands acquired under the statutes; and thus practically disposes of the case.

We do not read the contract as does the learned court. Wherein is it "agreed" by the defendant in error "on the 15th of November, 1882, to transfer and assign" his interest?

The contract is dated November 1st, 1882, and therein defendant in error agrees to sell to plaintiff in error all his rights, titles and interests in the lands acquired by his application and files. This application had already been made, as recited in the contract. For the rights, titles and interests which defendant in error had acquired under such application, on the day the contract was made, plaintiff in error agreed to pay certain money consideration, at Dallas or Austin, after inspecting the records to ascertain the regularity of files and the amount of land covered by the application. Then follows the only provision of the contract which contains any allusion to the 15th of November, 1882, to wit:

"It is understood, however, that the said inspection, ascertainment of regularity of files, and of the amount of land by approximation, shall be

completed on or before the 15th day of November, 1882, and that the said Count Telfener shall not be entitled to any delay beyond that time for said purposes and for making the payment aforesaid" (fol. 17).

In construing this contract we must not lose sight of the construction placed upon it by the other party. The plaintiff in the action alleges in his complaint:

"That on the 1st day of November, 1882, plaintiff was the sole owner of a certain valuable, valid and transferable interest in the whole of a certain body of land, containing, as subsequently ascertained by lawful survey, eighteen hundred and thirteen tracts of land of six hundred and forty acres each, being in the aggregate one million, one hundred and sixty thousand, three hundred and twenty acres, situated in the county of El Paso and state of Texas, and forming a part of what is known as the 'Pacific reservation'; that plaintiff had become the owner of said interest in said eighteen hundred and thirteen tracts by complying with the requirements of the laws of the state of Texas" (fol. 2).

We submit, therefore, that the learned court below was mistaken in assuming that the 15th day of November, 1882, was the date governing the interest which the defendant in error undertook to sell, and that consequently its conclusions based upon that assumption are erroneous.

Our adversaries while admitting that "the assignment by Russ did not pass to Telfener either an absolute right to the land or to the right to acquire it," contend that the assignment "did pass a right to purchase the land as against every other person than the state, or would-be pre-emptors." (Defendant in error's brief, filed in October last, p. 13). This is the whole contention of the defendant in error, and upon this proposition his whole case rests. The counsel mean to say that the defendant in error had an absolute right, as against any other applicant, to purchase the land. This is not true. An applicant

has no right by virtue of his application. No one applicant has any right over another until the survey is made and a record thereof filed. Until this is done, one applicant has, under the statutes, the same right as another. The one for whom the survey is made and the record filed, is the one who acquires the right under the statutes. The defendant in error recognizes the possibility of another application, when in the contract he warrants against all persons claiming "through or under *him*"—not against *other* applicants or persons claiming under *them*.

On the same principle, our adversaries would destroy the force of the authorities cited by the plaintiff in error. They take the ground that while the courts have declared that until the land is surveyed as required by the statutes no right is vested in the applicant as against the state; yet it does not follow that a right may not vest in one applicant as against another.

This contention is illogical. If applicants have no rights against the state, how can they have rights between themselves? A right against the state is the primary right, and without it there can be no secondary right. A right in favor of one or the other against the state must exist before there can be a right between the two. The weakness of our adversaries' case is shown by this attempt to distinguish the indistinguishable.

Counsel, in their attempt to show that Russ had an assignable interest in the lands, cite the case of Graham *vs.* Henry (17 Texas, 164), which held that a conditional land certificate issued by the Republic of Texas under the Act of December 14th, 1837 (sec. 29), was assignable.

The court will notice that the person to whom the certificate was issued acquired thereby an exclusive right to the land, which could be defeated only by his own failure to perform the conditions required of him. The act provides that "every person who has arrived in this Republic since the Declaration of Independence, and previous to the first of October,

1837, who is a free white person and the head of a family, and who actually resides within the government with his family,* shall be entitled to a conditional grant of twelve hundred and eighty acres of land, by paying the fees of office and surveying. The conditions of said grant shall be that both grantee and his or her family shall remain and reside within this Republic, and do and perform all the duties required of other like citizens, for the term of three years; after which time, he or she shall receive an unconditional deed for said land."

The court said:

"In general, whatever is susceptible of exclusive, individual appropriation, may be the subject of bargain and sale; so that property, considered as an exclusive right to things, implies not only a right to use, but a right to dispose of them. Whatever exclusive right a man has in any thing, he has a right to dispose of absolutely, as he pleases, provided he makes no disposition of it prohibited by law. * * * The conditional certificate vested in the grantee an interest or right which was capable of being perfected into a title. It was a contingent interest, it is true, subject to the condition that he and his family should remain and reside within the republic, and perform all the duties required of other citizens for the term of three years; after which he should receive 'an unconditional deed' for the land." But though a contingent, still it was an exclusive interest, or a right which was assignable in equity, and the transfer might be enforced, if made for a valuable consideration."†

This decision clearly defines what may be the subject of bargain and sale: it must be "susceptible of xclusive, individual appropriation," in other words, it must be a vested right.

We submit that the case cited is not applicable to the case at bar. Russ had no exclusive right—he had no vested right. At the time of making the contract he had simply filed his application, and this

* The land was expressly given to this class of citizens by the constitution of 1836 (Section 10).

† The legislature of Texas two years later prohibited the assignment of these certificates (Act of Jan. 4, 1839).

gave him no right whatever (White *vs.* Martin, *supra*).

There is no substance in the claim of the defendant in error. Let us for a moment inquire into the merits of this case. First and foremost, the land was never worth anything, not even the statutory price. For three years and more the state had offered it openly—publicly—and nobody seemed to want it. It became prospectively valuable, suddenly—when Mr. Attorney Westcott told Mr. Attorney Baccarrisse, and Mr. Attorney Baccarrisse told somebody else—Russ perhaps—that Count Telfener, of Italy, was looking for "at least one million" acres. So, while "negotiations" were pending between these attorneys—in October—the application for the million acres (and nearly two hundred thousand additional!) was made, and on the first day of November a formal contract was drawn, whereby Mr. Attorney Baccarrisse bought the "interest" acquired under this application in the name of Count Telfener, and agreed to pay for it *$290,000* in fifteen days, besides assuming the statutory price of $580,160; so that defendant in error, for an application, filed under the statutes, at the nominal cost of a survey, was to receive, in less than thirty days thereafter, nearly *three hundred thousand dollars;* and yet it is proven by Russ himself that when the contract was made, and for fifteen days thereafter, the "interest" so sold *was valueless.* (Defendant in error's brief, p. 27).

So much for the equity of the defendant in error's case. We beg leave to intimate to this Honorable Court, and to the learned counsel for the defendant in error, that we perceive in this transaction some indication of bad faith.

Briefly stated our position is this:

The interest which the defendant in error undertook to sell to the plaintiff in error was not assignable. In any event, the defendant in error had no interest in the lands when he made the contract, and never acquired any thereafter. He

had no interest to sell; hence there was a failure of consideration. The only interest in the lands which the defendant in error claimed to possess when he made the contract, was based upon his application under the statute. This application conferred no right upon him until a survey of the land had been made. The land had not been surveyed when the contract was made, therefore he had no interest to sell. Assuming that a part of the tract had been physically surveyed on the first day of November, 1882, it avails nothing, because he undertook to sell an interest in "the whole of a certain body of land," and since, under the law, he had no such interest, he could transfer nothing. It matters not that the defendant in error made attempts, subsequently, to survey the whole tract. The question remains: What was his interest at the date of the contract? Attempts have been made to introduce November 15th, 1882, as the controlling date, and the courts have incautiously fallen into this error. It is entirely unwarranted, and has no basis to sustain it. Assuming, however, that if the surveys had been made before that date, the plaintiff in error was obligated under the contract to take the "interest," yet, since it has been shown that it was an impossibility to make actual surveys within the time claimed, the pretended surveys are valueless, and no surveys at all, and plaintiff in error was not bound to take anything.

Assuming, even further, that if the surveys had been made before the action was brought the plaintiff in error was obliged under the contract to take the interest, yet since the field notes covering 1,144,960 acres were not filed within the time provided by the statute, the defendant in error acquired no substantial interest in the lands. Besides all this, the condition of the contract was never fulfilled, and the agreement failed in consequence.

Tenth.

The judgment of the court below should be reversed, and judgment ordered for the plaintiff in error, with costs.

ANDREW WESLEY KENT,
Of Counsel for Plaintiff in Error.

No. 462

SUPREME COURT OF THE UNITED STATES.

October Term, 1895.

COUNT JOSEPH TELFENER, PLAINTIFF IN ERROR,

vs.

GEORGE W. RUSS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

CLARENCE H. MILLER,
JOSEPH WHEELER,
For Petitioner.

by Russ

HUTCHINGS PRINTING CO., AUSTIN.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR REHEARING.

George W. Russ respectfully asks the court to grant a rehearing in this cause for the following reasons:

I.

There was direct, positive and uncontradicted testimony that the land was surveyed on the ground. An actual survey in the time ~~itself~~ was not a physical impossibility, nor even an improbability according to the expert evidence of Maddox and the rules of civil engineering. The court erred in holding as a question of fact that "no survey of land on the ground, of that extent, could have been made during the time designated." (Opinion, p. 7.)

stated

We agree that 7156 miles were not and could not have been surveyed between October 13th and November 3rd, 1882. This court knows we never contended to the contrary, and to rest the case upon any such statement is to evade the real issue. We cannot understand why the evidence should be overlooked. If we have not the right to insist upon this court's considering the

testimony in the record we had as well yielded in the first place to any position that plaintiff in error might care to take. The statement that it was necessary to travel four times 1813 miles, that is 7156 miles, in order to survey 1813 sections is indefensible in the opinion of this court. It would be wholly unnecessary if every corner of every section was marked on the ground unless every section was entirely separated from every other. It does not seem to us that that proposition should need argument or illustration by geometrical figures. But the sections were not separated each from the other, but were in large blocks whose geometric outlines are not given in the record. We can therefore take that outline that requires the least distance to do the work. The writer of the opinion in this case, to make the task look as difficult as possible, simply multiplied the number of sections by four. In view of the fact that all the evidence is not set out in the record (which ought in justice and under the decision of this court—Corrine Co. v. Johnson, 156 U. S. 574—to relieve us of this discussion and settle this point), we are entitled to every presumption in our favor. In the first place then it appears (Rec., p. 2) that the lands applied for were described in the applications by "metes and bounds, courses and distances." This necessarily presupposes a previous preliminary survey of the outside lines of the whole tract. Can this court say how many miles were run in that survey, or that it was not done by the county surveyor of said county, and that thereby much less surveying under the application was left to be done? Then, are we not entitled, in view of the incomplete record, to that presumption? If so, the careful calculation in the opinion to make up the greatest possible number of miles that could be run goes for naught. But, in the next place, if we show that the greatest number of sections that were purported to have been surveyed in one day could have been and were surveyed on the ground in that time, then it must follow that all the land could have been surveyed in the time stated. The greatest number of sections claimed to have been surveyed in one day were two blocks of 72 and 136 sections surveyed October 27th. Evidently it was not required to run four times 136 miles, as suggested in the opinion, in order to mark each corner of each section in the larger block. The mathematically inclined members of this court can more

readily than we calculate the least distance that could be traveled in doing so. But on what authority does the court hold that we must, to come within the law, establish four corners to each section? The requested charge of plaintiff in error to the jury did not announce any such rule, but left the whole matter as to what was a survey on the ground to the jury. If the court's view is correct then the charge was incomplete and was rightfully refused, and this question was not properly raised so as to be before this court.

But waiving that point in our favor, as this court has insisted upon doing, the only testimony as to what is termed actual surveying on the ground was Maddox statement (Rec., 33) that putting only two corners to each section fulfilled the requirements. Are we not then entitled to the benefit of this uncontradicted evidence of the plaintiff in error's own witness? Why does the opinion ignore this; not only that, but contradict it by proceeding upon the theory that four corners to each section were necessary? As we have no right of appeal to a higher court, we think this court should shield us from the effect of such errors. The problem, then, is to ascertain the least number of miles to be run in order to establish two corners to each section of the larger block. We ask that some member of the court solve this problem. One solution, but not the best for our contention, is a block 10 sections wide and $13\frac{1}{2}$ long, requiring $75\frac{1}{2}$ miles. The smaller block, if 6 sections wide and 10 long, could have been so surveyed by running 41 miles—the two blocks requiring $116\frac{1}{2}$ miles instead of 832 miles under the plan pursued by the writer of the opinion. As it only requires 3 persons to survey, and there were from 20 to 30 persons so engaged, or from 7 to 10 surveying parties, it was not at all impossible under the evidence to have done the work on the ground. That two corners to a section is an actual survey is shown by similar Texas laws—Laws 1879, page 10, section 8; and 1881, page 66, section 16. In addition to this the certified field notes bear the official statement that the surveys were made on the ground. Rev. Stat., art. 3908. Duncan testified the surveys were so made and he superintended it. We submit this court erred in holding as a matter of fact, without all the evidence before it, that the surveys could not have been made on the ground. The opinion, to that extent at least, should be modified in view of another trial.

II.

The survey of the lands vested in Russ the right—even as against the State—to complete the purchase and secure a patent within the prescribed period. The court erred in holding that Russ could not acquire such vested right until "after the map and field notes of the survey were filed in the General Land Office."

This proposition has been expressly announced by the Supreme Court of Texas.

In White v. Martin, 66 Texas, 340, the application for purchase was made November 23, 1882, and the survey was made December 21, 1882. The act in question was repealed January 22, 1883, before anything was done but filing the application and making the survey. The field notes and maps were not filed in General Land Office till January 30, 1883, more than a week after the repeal of the law. The question was raised as to whether the applicant acquired a vested right before the repeal. The court said (66 Texas, 344):

> How may the applicant become a purchaser? The statute answers the question. He "may do so by causing the tract or tracts which such person, firm or corporation desires to purchase to be surveyed." When this is done as the act contemplates, then, and not before, the State contracts, upon the purchaser's complying with the other requirements of the act, that it will convey to him the land surveyed.
>
> The survey was made for the appellees within the time prescribed by law and thus was vested his right. . . .
>
> The ninth section declares that if the applicant fails, refuses or neglects to pay for the land within the time prescribed, "he shall forfeit all right thereto."
>
> The right cannot be forfeited before it exists; hence we have the clear declaration in the statute that it is not the payment of the purchase money which vests the right to have the land, but that the right vests in the person who has had the survey made, which, however, may be lost by failure to comply with the other terms required of him.

Comment could not make this language plainer. The survey vests the right, and not the payment of the money.

The same question arose and was decided in Jumbo Cattle Co. v. Bacon, 79 Texas, 5. There the application was made December 1, 1882, and surveys made January 19 and 20, 1883, two days before the law was repealed. It is not stated when the other steps toward securing patent were taken, except that they

were taken within sixty days after the survey. The court said (79 Texas, 12):

> The question then is as to the effect of the act of January 22, 1883, which repealed the acts under which appellees made application to purchase the lands. The application had been made and the land had been surveyed when the repealing act took effect. Had the appellees then acquired a vested right which the legislature could not take away? . . . . . The ruling in White v. Martin (66 Texas, 340), is decisive of the question . . . . . In the case cited it was held there was a vested right which was not destroyed by the repealing act.

In Cambell v. Wade (132 U. S., 34), the question did not arise as no survey was made before the repeal. Merely an application was made before repeal, and hence that case is not authority on the point under discussion. In that case, however, it is said:

> But for this declaration of the act, we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the State.

This clearly means that the act declares that a right to purchase is conferred by mere survey so as to bind the State.

In that case and in the opinion on the former appeal of this case (145 U. S. 532), this court intimates that in its opinion no right vested till after the field notes and map were filed in the general land office, but the question was not involved in the former case because only an application had been made before the repeal of the law and its decision was expressly postponed in this case.

It is then an open question in this court. The views expressed in those opinions were based on the rule frequently held by this court in pre-emption and homestead cases under the Federal Statutes, that until everything required under the law was done, even to the paying of the purchase money, no vested right as against the government was acquired. If it were an open question under the Texas decisions and further, if the Texas Statute, under consideration, did not expressly state that by causing a survey the applicant acquired a right to complete the purchase, the principle announced in those cases would be conclusive. But in view of the language of the Statute and the construction placed upon it by the Supreme Court of Texas the

principle in those cases should not be applied. It seems to us there is no room for difference of opinion about this matter. The above quotation from the Wade case shows that this court then reluctantly recognized the force of our contention. In White v. Martin the map and field notes were not filed in the land office until after the repeal of the law, and notwithstanding that, the court directly held that the applicant had before the repeal acquired a vested right. How then can it be seriously contended that that case is authority for this court's proposition that no such right exists till after the map and field notes are filed in the general land office? The Jumbo Cattle case is equally strong and pointed. The real question is not what those two cases decide, for the facts are plain and the language unmistakble, but rather whether this court will insist in applying, in construing the Texas Statute, principles announced by it in somewhat similar cases in spite of and contrary to the construction of that statute by the Texas courts.

III.

Under the most hostile view that can be taken of Russ's rights and obligations, it is going too far to hold that he was bound to pay or tender the State 50 cents an acre for the land before he would be in a position to demand performance on Telfener's part.

The court erred in using the following language: "*In this case there was no offer or tender of performance by the plaintiff to the State, which was essential to create an obligation to pay any money on the part of the defendant. There is, therefore, no ground for recovery by the plaintiff upon his alleged contract with the defendant, there having been no such performance, or offer of performance, on his part to the State as would enable him to acquire such an interest in the property that he could comply with his engagement to the defendant.*" (Opinion, p. 6.)

And again: "*The claim, therefore, of having acquired any right or title in and to the whole amount of the lands by the proceedings taken was manifestly groundless. The plaintiff below could not convey any proprietary interest in the whole amount of the lands desired until the required payment therefor was made, and any promise by the defendant below, Telfener, to pay to him 25 cents, or any amount, for an acre of such hoped for, and not acquired, land * * * * * was worthless, without any value or consideration.*" (Opinion, p. 4.)

The ~~agreement~~ argument under proposition two, supra, shows that Russ did have a vested right to complete the purchase solely by virtue of the surveys, and under proposition three that such right was valuable. Taking these propositions for granted, it remains to consider, (1) at what stage of the proceedings he could demand performance on Telfener's part, and (2) what performance on his part was necessary to perfect his right of action against Telfener.

Telfener contracted to pay 90 per cent of the purchase price November 15, 1882, and in the opinion on the former appeal of this case this court, in discussing the measure of damages, said:

"On the 15th day of November he, Russ, possessed all the right to the land which he ever possessed."

It is alleged in the petition that Russ was ready and willing to receive the said payment on said date at Dallas, and to transfer his interest under the application, but that Telfener, although notified, without excuse or requesting further time, failed to appear or to perform his said obligation. (Rec., 6.) It was impossible, on account of Telfener's absence, to make any further tender of performance. Russ had not contracted to convey on that date the lands, nor the legal title thereto, nor to ever do so. It is not, as stated in the opinion, page 1, a case of "an alleged breach of contract for the sale, by the defendant to plaintiff, of certain unappropriated public lands." That erroneous view runs through and vitiates the reasoning throughout the opinion. Russ never expected to sell the lands, nor Telfener to buy them from him. It was a sale of Russ' right to complete the purchase, by virtue of his application and such steps under them that he might take prior to November 15, 1882. ~~If this is not plain and acceded to by the members of this court, they had as well save themselves the trouble of reading this application any further.~~ On the 15th he had the vested right to complete the purchase by reason of the surveys having been previously completed. He was therefore then in a position to do all he had contracted to do, to convey a perfect title, a completed title, not to the lands, but to his vested right to buy the lands. It is irrelevant to say that that right might have subsequently lapsed by a failure to proceed with the other steps. Both parties knew that when they contracted, the one to convey and the other to pay on said date. Russ never contracted, nor did Telfener expect him, to pay the

50 cents per acre to the State and then convey a legal title to the lands. Why, then, will this court insist upon adding that clause to the contract? Could the parties by mutual agreement not make a valid contract concerning Russ' rights under the application and survey ("the rights * * * that the said Russ now has or may be entitled to in and to said lands by reason of such application"), without at the same time adding thereto the clause that Russ should acquire the legal title from the State? They tried very hard to do so and to clearly express what they were respectively selling and buying.

But to return to November 15, was not Russ' right of action for damages complete on that date? Could he not have sued Telfener the next day? and if not why not? The opinion says he could not because he had not acquired a valid legal title from the State. That was to be done, if at all, long after that date. But the court has overlooked the vital fact that Russ never contracted to get such title, nor that under the contract the law would not enforce that condition upon him. The most that can be said of his obligations under the contract is that he was to have caused to be made the surveys, field notes and maps and have them properly filed and pay the office fees for filing said documents and for issuing of the patent. We insist that Telfener's default on the 15th relieved him of any further performance thereafter and at once gave him a right of action for damages. He had before that day performed the conditions precedent to acquiring all that he ever undertook to transfer, a right to purchase the desired lands. For that reason the cases cited on page 6 of the opinion are inapplicable. Russ fully complied with the principle announced in the decisions. He did not comply according to the opinion in this case simply because there is added therein a clause not in the contract, and chiefly because the distinction between the right to purchase, which was the real subject matter of the contract, and a legal title to the land is not observed in the opinion, unless it is meant to be insisted on that not even a right to purchase could be acquired without tendering to the State the purchase money. But even then the court must go further and say that Russ acquired under his application and survey a valueless interest instead of a vested right, for the contract was simply to convey whatever right he had November 15th, or might thereafter acquire by virtue of his application.

Take the case of an option on real estate, for which a party pays—say $100. He contracts to sell the land to another party on a certain date for a price that will bring him a profit of $100, but his purchaser fails to pay on that day or to make any excuse for his default. Would this court hold that the owner of the option could not sue for his profit without purchasing the real estate? That is, however, the precise reasoning applied by this court to this case. The contract in question was not to convey land nor to acquire the title thereto, and the rule in Anvil Mining Company v. Humble, 153 U. S., 551, is applicable. It is:

"Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it and recover damages, the profits he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is really an acceptance of the situation which the wrongdoing of the other party has brought about."

The authorities on the right to abandon further performance and recover for breach of contract are collected and discussed in Lawyers' Report, annotated vol. 30, pp. 33 and 54, note. (January 15, 1896.)

But if Russ was required to perform all the obligations in the supplemental contract, Exhibit N, he fulfilled the requirement in that particular. He had the surveys made, the field notes and maps certified to and filed in the land office, and paid the office fees. These were all regular and done in time, because he obtained patents for twenty-five sections of the land. If the field notes were not filed strictly in time it was no ground of forfeiture, as decided in N. Y. Land Co. v. Gardiner, 32 So. West. Rep., 786.

We submit, however, the duties devolving upon Russ under the supplemental contract were independent covenants, a performance of which was not necessary to allege or prove in order to sue on the first contract. The petition, it is true, declares on both contracts, and on the latter in order to recover the consideration therein stated, but upon exception of defendant (Rec., 15), the court struck out that part of the petition. That leaves before this court only the allegations concerning the first contract. That the covenants are independent is held in Land v. Pomona Company, 153 U. S., 564; Pollock v. Brush, 128 U. S.,

457; Taul v. Bradford, 20 Texas 263, and 30 L. R. A., 33. Should the court refuse to grant a rehearing and affirm the judgment we, at least ask in view of another trial, that the opinion be so modified as not to require plaintiff to show that he paid or tendered to the State the purchase price of the land. It was not required of him under the contract, and we are confident this court, upon further reflection, will recognize that it was not necessary under the law.

IV.

Russ acquired by his application alone *a position of advantage as against Telfener and other would-be applicants. He enjoyed for 90 days solely by virtue thereof a privilege or right of preference to complete his purchase that in Telfener's eyes was very valuable property, and which, in the eyes of the law, was a good and sufficient consideration for Telfener's undertakings. The court erred in holding that nothing of tangible or appreciable value passed to Russ by his application; that he could not by virtue thereof transfer to Telfener anything but "his hopes of securing a million acres of land."* (Opinion, p. 8.)

The member of the court who wrote the opinion in this case is disposed to treat the above proposition with contempt, and yet it is so just and fair that in our opinion it should receive not only the hearty concurrence of every sound lawyer, but even of any intelligent layman to whom it is clearly stated. The opinion does not discuss it nor combat it with authorities, but drops it (opinion, p. 8) because it "does not merit consideration." The courts of Texas estimate our contention quite differently. In McKinney v. Grossmeyer, 51 Tex., 382, it is said:

> It was the practice of the country, to a considerable extent, and one which was recognized by the courts, to hold lands by files merely, without actual survey. And we believe that this practice was in conformity with law. After the enactment of the statute requiring a survey within twelve months from the date of location, the file or location without actual survey was still valid to appropriate and hold the land during the twelve months.

This case is followed in Vance v. Lindsey, 60 Tex., 286, and Cassen v. O'Sullivan, 61 Tex., 594.

In Hobert v. Wilson, 31 So. West. Rep., 711, the court said:

> The law awards the land to the first applicant who is able to make affidavit to actual settlement, and comply with the other requirements of the statute;

and the fact that some other person may have preceded him in settling thereon, but not in making application to purchase, will not deprive him of the rights thus guaranteed.

Did Russ occupy towards the desired lands no better position *after* his application was properly filed and accepted by the surveyor than he did before? He had advanced one step at least towards the purchase. Did not this first step, a step certainly as necessary as any succeeding one, give Russ any advantage over Telfener, any right of preference in causing the surveys to be made? Was not that position exclusive for a time and therefore valuable? The sense of justice and fair play in every human conscience assents to these questions. And even Telfener at the time recognized Russ' rights although his selfish interests afterwards led him to deny them. He considered that right worth and promised to pay for it over a quarter of a million of dollars. His shrewd Italian business sense then differed totally from the learned opinion in this case, but for obvious reasons he now concurs. He on November 1st, 1882, contracted to buy and was satisfied, even at the great sum he offered, to get nothing but "the rights, titles and interests that the said Russ now has or may be entitled to in and to said lands by reason of such application and files." That he was to get November 15th, 1882, and to pay for it.

During that time he lead plaintiff to believe he was acting in good faith and afterwards, instead of refusing to accept the benefits of the contract, he on the contrary, held himself out to capitalists as being the owner of the said lands under said contract. (Rec., 8.) Was not the detriment to Russ' chances of selling to others during that time a consideration for the contract? The court seems in some way to have gotten the impression that Telfener has been badly treated—that there is an effort to unjustly wrest from him a vast sum of money. The opinion would indicate to a stranger to the record the case of a shrewd, astute man attempting to get the better of a weak minded or inexperienced person. Telfener was a foreign speculator that expected by operating from New York on a large scale through agents in Texas to make a vast fortune in a short time. Because his extensive ventures did not turn out successfully he seeks to escape liability by pleading the very immensity of those liabilities. The size of the judgment has evidently, from questions

asked on the oral argument and the language of the opinion on page 8, disturbed some of the members of this court. Of course we are powerless to reply to such intimations. From that standpoint it would seem to be our misfortune that the suit was not about a dozen sections instead of over a million acres. It seems trivial to say that the measure of damages was settled on the former appeal and the verdict is in strict conformity under the evidence with the rule laid down by this court. And yet we know of no other defense open to us on that score. The principal of the verdict, though large, is no more than Telfener promised to pay Russ and for which he thought he was getting and according to the then market prices was getting in fact a full equivalent. The fact that the market price declined in fifteen days twenty-five cents an acre was Telfener's misfortune. Upon no principle of even abstract justice should the loss be visited upon our client.

But not only from the standpoint of common sense and the view taken by the Texas courts did a valuable right pass to Russ, solely by his application, but the principle is recognized by this court in analogous cases. Does a pre-emptor acquire by settlement, with a view to pre-emption, a right any more valuable than an applicant under the Texas law acquired by filing his application? If the latter has nothing more than "his hopes of securing land from the State, for which he does not hold any promise or obligation of the State," is not the former's interest as shadowy and in every respect as precarious? We are utterly unable, after intense consideration, to discover any difference. Neither, of course, has a vested right, and it would certainly seem that if one has a valuable right the other also has. Now, this court has frequently held that the former does thereby acquire a privilege, in case the lands are offered for sale, that he may purchase in preference to others, and that contracts concerning such privileges are valid as between the parties, though the government is under no obligation to either of the parties in regard to the title. (The Yosemite Valley case, 15 Wall., 77; Frisbe v. Witney, 9 Wall., 187; Lamb v. Davenport, 18 Wall., 313; Shepley v. Cowan, 91 U. S., 330; Rector v. Gilson, 111 U. S., 285.)

How can those decisions be reconciled upon principle with the opinion in this case? The pre-emptor had no right as against

the government to complete his purchase. He did not hold any promise or obligation of the United States. His settlement did not bind him to proceed any further in the matter; nor, in the absence of other proceedings, could it bind the government to sell the lands. And yet, notwithstanding all this, it is firmly settled by this court that a contract made by a pre-emptor concerning such an elusive inchoate right is binding as between the parties to the contract. If this reasoning and these authorities do not contradict the statement that our contention "rests upon no solid foundation" and "does not merit consideration," then we submit that the opinions of this court confuse rather than enlighten the members of the bar.

If we are correct in our contention, and if the default of Telfener, November 15, 1882, excused Russ from further performance (see discussion supra), then the judgment should be affirmed without considering other questions in the case.

V.

Russ was ready, able and willing to transfer to Telfener his right to purchase the whole amount of land described in his application, all that he had contracted to convey. The court erred in holding Russ could not recover because all the land was not surveyed when the contract was made.

This court criticises, as untrue, the allegation in the petition that Russ was November 1st, date of the contract, the sole owner of a valuable, valid and transferrable interest in the whole body of land because 98 sections were at that time unsurveyed and because of these allegations it is disposed to consider that Telfener should be relieved of all liability irrespective of the facts or real merits of the case. The allegations were based on the idea expressed in the contract itself, that before that date no surveys were made but that such an ownership resulted solely from the applications, and are rather a statement of legal conclusions than of facts. The way in which he became such owner is stated and the contracts are attached as part of the petition. If he was not such owner November 1st, but became such before November 15th, when he was to make the conveyance, can Telfener, who fully knew the condition of plaintiff's rights on the 1st, and contracted with reference to them as they then were or

might be thereafter, can he seriously maintain on account, of the mistatement to make the most of it. of a legal conclusion in the petition, that he should go hence. The court says: "Telfener had never proposed to take any less than the whole amount nor contracted to do so." We say: Telfener never proposed to take any November 1st, and before the time for him to take arrived Russ was ready and anxious to transfer his right to every acre and fraction thereof, covered by the application. The court further said: "An offer of any less by Russ, had it been made, *of which there is no evidence*, would never," etc. (Opinion, p. 3.) Why is there no such evidence? Because Telfener deliberately prevented Russ from making a tender. It would be hard, indeed, if a failure to make a tender of conveyance is to be laid at our door when the slippery but honest and persecuted Telfener eluded our every search. (Rec. 5-8.) This case cannot be reversed, even if there is a misstatement in the petition, on the theory that Russ could not and did not offer to convey his right to all the land. November 15th, the day set for the transfer and the payment, Russ was fully ready, and the only trouble was that Telfener wholly made default.

VI.

The court erred in holding that, under the law, an application could be made by one person to only one section.

The court relies on section 6 in the original act, and states its substance, page 1 of the opinion, while section 6 was amended in 1881, before this contract was made. The court in summarizing the grounds on which the writ of certiorari was submitted by plaintiff in error (Opinion, p. 4)—or, more correctly speaking, in stating what grounds counsel should have taken—for they did not in their briefs or on the oral arguments make several of the contentions attributed to them in the opinion, the court in so stating the errors relied on is again mistaken, for it was never suggested, except by members of the court in oral argument, that one person could not apply for an unlimited number of sections. The amended section 6, and not the one referred to in the opinion, and sections 2 and 5 and the Texas decisions settle this question.

The amended section 6 reads: "These lands shall be sold in tracts of 640 acres each," etc.

Section 2 reads: "That any person, firm or corporation desiring to purchase *any* of the unappropriated lands . . . may do so by causing the tract or *tracts* . . . to be surveyed," etc.

In section 5 it is said:

"Said commissioner shall issue to said person, firm or corporation a patent for the tract or *tracts* of land so surveyed and paid for."

The use of the language "tract or *tracts*" shows that it was contemplated that a person, firm or corporation should have the right to apply for and purchase more than one tract of 640 acres.

In the case of Jumbo Cattle Co. v. Bacon, 79 Texas, 5, the application by one person covered 27 sections and was upheld.

CLARENCE H. MILLER,
JOSEPH WHEELER,
For Petitioner.

I certify that this petition is presented in good faith, and I believe it is based on meritorious grounds.

CLARENCE H. MILLER.

Austin, Texas, May 1st, 1896.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

COUNT JOSEPH TELFENER, PLAINTIFF IN ERROR, v. GEORGE W. RUSS, DEFENDANT IN ERROR.	No. 462.

Brief, and Petition for Re-hearing.

We respectfully request a re-hearing in the above-named cause.

The undisputed facts in the record disclose:

1st.

That, on November 1st, 1882, Count Telfener contracted in writing with Geo. W. Russ to purchase of him (Russ) his rights and interest in 1,000,000 acres of land, more or less, which rights Russ had acquired by reason of an application made under a law of Texas; said land being in El Paso county, Texas. (Record, p. 9 and 10.)

2nd.

That Telfener assumed the payment of 50 cents an acre to the State. (Record, p. 2).

3d.

That Telfener was to examine the record and files and it was stipulated that

"If it shall be then shown that the application and files thereof have "been regularly and properly made in such manner as under the terms "of said law would entitle the said Russ to become the purchaser of said "lands from the State of Texas,"

then in that case the said Count Telfener agreed to pay to Russ on November 15, 1882, 25 cents per acre, and Russ was then to transfer his rights, interest, etc. (Record, pages 9 and 10).

4th.

That Telfener (record, page 4), by his agent, visited the land office of El Paso county before November 15, 1882, and examined the records and found that the application and files had been regularly made.

5th.

That Telfener, though having a copy of the contract in his possession, failed to comply and pay the 25 cents per acre, and has to this time utterly and entirely failed to pay any part of the purchase price, but that said Telfener (record, page 5)—

"held himself out to capitalists to be the owner of said lands under "said contract." (Record, page 8.)

6th.

That in order to reduce the damages as much as possible Russ had the surveys completed, and the surveys and

field-notes filed in the General Land Office at great expense to himself.

7th.

That Russ had caused to be surveyed and had a vested interest in more than 1,000,000 acres of land on November 1st, the date of the contract, and a vested interest in 1,160,320 on November 15, the day he was to assign his titles.

8th.

The supreme court of Texas, in a case which this court quotes approvingly, decides that Russ had a vested interest in the land for which he had filed applications and which he had caused to be surveyed.

Some of the Errors in the Opinion.

The cause of action grew out of a contract between Russ, plaintiff below, and Telfener, defendant below, executed on November 1, 1882, by which Telfener agreed to pay to Russ 25 cents per acre on November 15, 1882, for the interest of Russ in 1,000,000 acres of land, more or less, which Russ had acquired during the month of October, 1882, pursuant to a law of Texas, which was enacted July 14, 1879, and amended on March 11, 1881.

1st Error.

The decision was in error in basing its opinion on sec. 6 of the law of 1879, which was repealed by the law of 1881.

The plaintiff Russ never claimed under the law recited in the opinion, and the position taken by the court was not insisted upon by the defendant Telfener.

2d.

The court states that until map and field-notes of the survey were filed in the general land office of the State it gave no right to the applicant to purchase the land.

In reply we say:

The case of White *v.* Martin (66 Texas, 340) decides that an applicant who had caused the land to be surveyed had acquired a vested right which could not be divested.

In this case, 66 Texas, page 344, the court said:

"How may the applicant become a purchaser? The statute answers "the question. He 'may do so by causing the tract or tracts which "'such person, firm, or corporation desires to purchase to be surveyed.' "When this is done as the act contemplates, then, and not before, the "State contracts, upon the purchaser's complying with the other require- "ments of the act, that it will convey to him the land surveyed. When "this point was reached, there existed an executory contract which gave "the purchaser a vested right, upon complying with his part of the con- "tract, to have the land purchased, of which subsequent legislation can- "not deprive them.

"On the faith of the State's promise, the applicant, in good faith, ex- "pends money to have the lands surveyed or incurs obligation to pay."

. . .

"The survey was made for the appellees within the time prescribed by "law and thus was vested his right." . . .

"The ninth section declares that if the applicant fails, refuses, or neg- "lects to pay for the land within the time prescribed, 'he shall forfeit "'all right thereto.'

"The right cannot be forfeited before it exists, hence we have the "clear declaration in the statute that it is not the payment of the pur- "chase money which vests the right to have the land, but that the right "vests in the person who has had the survey made, which, however, may "be lost by failure to comply with the other terms required of him."

The report in White *v.* Martin shows that the field-notes and maps were not filed in the General Land Office until January 30, 1883, eight days after the act was repealed.

We respectfully submit that this shows that a survey

vests the right and not the filing of the field-notes or the payment of the money.

The same question arose and was decided in Jumbo Cattle Co. *v.* Bacon (79 Texas, 5). There the application was made December 1, 1882, and surveys made January 19 and 20, 1883, two days before the law was repealed. It is not stated when the other steps toward securing patent were taken except that they were taken within sixty days after the survey. The court said (79 Texas, 12):

> "The question then is as to the effect of the act of January 22, 1883, "which repealed the acts under which appellees made application to "purchase the lands. The application had been made and the land had "been surveyed when the repealing act took effect. Had the appellees "then acquired a vested right which the legislature could not take "away? . . . The ruling in White *v.* Martin (66 Texas, 340) is "decisive of the question. . . . In the case cited it was held there "was a vested right which was not destroyed by the repealing act."

In Campbell *v.* Wade (132 U. S. 34) the question did not arise as no survey was made before the repeal. Merely an application was made before repeal, and hence that case is not authority on the point under discussion.

The court, however, conceded that our contention was correct. It said:

> "But for this declaration of the act, we might doubt whether a right "to purchase could be considered as conferred by the mere survey so as "to bind the State."

We respectfully submit that this clearly means that the act declares that a right to purchase is conferred by the mere survey so as to bind the State.

This question was not decided by this court on the former appeal of this case, but its determination was expressly postponed.

The contract made Nov. 1st bound Telfener to pay Russ 25 cents per acre on Nov. 15th, and upon said payment being made Russ bound himself to assign

" unto the said Count Telfener all and singular the rights, titles, and in-
" terests that the said Russ now has or may be entitled to in and to said
" lands, etc."

On Nov. 15, the date Russ agreed to make the transfer, all the lands *had been surveyed*, and they *all vested* in *Russ*, and the record shows that Russ was able and ready to transfer and assign as per his contract.

The decision says (page 1):

" The statute declared that no tract of land should be sold under the
" provisions of the act which contained more than six hundred and forty
" acres, and that no tract should have a greater frontage on any running
" stream or permanent water than one vara per acre for each survey of
" three hundred and twenty acres or less, and three-fourths of one vara
" per acre for all other surveys."

The decision then says (page 4):

" The plaintiff in error now submits, upon the writ of *certiorari* from
" this court, that there was manifest error in the rulings of the circuit
" court of appeals requiring the reversal of its judgment, in this:
" *First.* That the law of Texas expressly restricted the right of the ap-
" plicant to purchase any portion of the unappropriated public lands of
" the State to six hundred and forty acres in one tract, and in this case
" the plaintiff claimed, and the court of appeals sustained his claim, that
" he had acquired a right, pursuant to the proceedings taken under the
" statute, to purchase one million one hundred and sixty thousand three
" hundred and twenty acres in one tract of the unappropriated lands of
" the State."

We respectfully submit and assert that no such question was submitted by the plaintiff in error, and further that plaintiff in error never contended—

" That the law of Texas expressly restricted the right of the applicant
" to purchase to 640 acres of land.

This section, which is recited in the opinion, was repealed March 11, 1881, a year and seven months before Russ made his application to purchase and survey the land. The amended section, under which Russ made his application, reads as follows:

" SEC. 6. These lands shall be sold in tracts of 640 acres each, unless

" precluded by previous surveys, in which event the purchaser must in-
" clude all the vacancy, and no tract shall have a greater frontage on any
" navigable stream or permanent water than one-half the square of such
" survey, excepting where surrounded by other surveys."

Section 2 reads:

" That any person, firm, or corporation desiring to purchase *any* of the
" unappropriated lands . . . may do so by causing the tract or *tracts*
" . . . to be surveyed," &c.

In section 5 it is said:

" Said commissioner shall issue to said person, firm, or corporation a
" patent for the tract or *tracts* of land so surveyed and paid for."

The use of the language "tract or *tracts*" shows that it was contemplated that a person, firm, or corporation should have the right to apply for and purchase more than one tract of 640 acres.

This construction is upheld in Jumbo Cattle Co. *v.* Bacon (79 Texas, 5).

In that case Bacon and Graves made application under the act July 14, 1879, and amendment of 1881 of section 6 for 27 tracts of 640 acres each; that is, 17,280 acres. The application was for the land in one body to be surveyed in 640-acre tracts. The lands were surveyed under this application before the repeal of the act. In regard to the construction of section 6 as amended, the court said:

" In our opinion this was not intended to prescribe or affect the form
" of the appplication. It simply prescribed the amount to be purchased
" in one survey. Its main object was probably to cause the lands which
" should be sold to be surveyed into sections with marked boundaries
" for the convenience of holders under conveyances from the purchasers.
" It was hardly practicable to designate the boundary of each section.
" desired to be purchased without a survey, and the act contemplated a
" survey after the application. Two surveys were certainly not required."

The court held that the one application for the 27 tracts, aggregating 17,280 acres, was valid under the act in question.

This conclusively shows that the number of sections that

one person, firm, or corporation could apply for and purchase was not limited by section 6.

This construction is further corroborated by the statement in White *v.* Martin (66 Texas, p. 343), where the court says:

"The act itself indicates a desire to raise money by sale."

We earnestly submit that this shows that not only did the statute permit one person or corporation to apply for many tracts, but that the law has been so construed by the supreme court of Texas.

The opinion says (page 2):

"No right, title or interest in the lands which Russ desired and applied to purchase passed to him solely by his application for the survey. "Until that was followed by the survey, map and field-notes of the survey, and they were filed in the general land office of the State, it gave "no right to the applicant to purchase the land."

This is immediately followed by an extract from White *v.* Martin, which the court cites to maintain the above assertion.

This decision of White *v.* Martin negatives this position taken by the court, viz: that the filing of the field-notes in the General Land Office was necessary in order to give the applicant a right.

The decision expressly states:

"When this (the survey) is done the State contracts, upon the purchaser's complying with the other requirements of the act, that it will "convey to him the land surveyed."

We respectfully submit—

1st. That the statute (sec. 3) specially makes it the duty of the surveyor, not the applicant, to file the field-notes in the General Land Office.

2d. The record expressly states (pages 30 and 34) that the surveys were filed in the General Land Office.

3d. The record also shows that the surveys were filed within 60 days from the completion of the survey.

4th. The case of New York Land Co. *v.* Gardiner (32 S. W. Rep. 786) decides that a failure to file the field-notes in the General Land Office within 60 days was no ground for forfeiture and was no infirmity.

5th. The record also shows that the State officials must have adjudged that the surveys were filed in time, as they received the 50 cents an acre upon 25 sections and gave title for the same.

The opinion admits this. It says (page 3):

"And of the land surveyed, payment at the rate of fifty cents per acre "was only made on twenty-five of the surveys; at least there was no "evidence of the payment on any other land surveyed."

We desire to call the attention of the court to the fact that the surveys of these 25 sections were completed on November 3, 1882, and were not filed in the land office until the 8th day of January, 1883, 66 full days after the surveys of these 25 sections were completed.

This shows that the officials of Texas adjudicated that they were filed in time, and we respectfully submit that a proper construction of the law is that surveys made pursuant to an application are to be filed within 60 days from the date of the completion of the survey of the entire body of land, and the record shows that the law was thus complied with in this case.

The opinion then says (page 4):

"The plaintiff below could not convey any proprietary interest in the "whole amount of the lands desired until the required payment there-"for was made, and any promise by the defendant below, Telfener, to "pay to him twenty-five cents, or any amount, for an acre of such hoped-"for and not acquired land, or for any less quantity, was worthless, "without any value or consideration."

We respectfully submit that the court must have been misled in this expression by the brief of the counsel for plaintiff in error, Telfener.

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The decisions of this court and the decisions of the

courts of all States negatives the principle laid down in the above-quoted paragraph of the opinion. Russ had certainly filed his application for the land with the surveyor, and he had caused more than a million acres to be surveyed prior to the date of making the contract, namely, November 1st, 1882, and the contract by its terms only compelled him to convey a million acres, more or less, and the supreme court of Texas has repeatedly held that where an applicant had done what Russ had, namely, filed application for the land and caused it to be surveyed, he had acquired a vested interest in the land that he could not be deprived of by an action of the State. For this court to say that such an interest cannot be transferred is not sustained by any decision in this or any other court. The whole tenor of the decisions of the courts has been to enlarge and extend the right to assign any interest which a person may have in property.

A few years ago the courts held that an owner of a contingent remainder in an estate could not sell or assign it, but now the courts decide almost universally that such an interest can be sold or assigned. I specially ask the court to read the decisions on this subject, pages 22 to 26 of our brief, which contains the alphabetical index.

The Supreme Court of the United States has decided in several cases that a pre-emptor may contract as to the rights he has acquired, and that the contract is binding between the parties. This is decided in 111 U. S. 285; 91 U. S. 330; 18 Wall. 313; 15 Wall. 77, and 9 Wall. 187.

In Lamb *v.* Davenport (18 Wall. 307) it was decided that a contract concerning a title to be acquired in the future was valid as between the parties to the contract, notwithstanding that at the time of the contract there were no rights as against the U. S. The head-note reads:

"Unless forbidden by some positive law, contracts made by actual

"settlers on the public lands concerning their possessory rights, and "concerning the title to be acquired in future from the United States, "are valid as between the parties to the contract, though there be at the "time no act of Congress by which the title may be acquired, and "though the Government is under no obligation to either of the parties "in regard to the title."

Also in Richardson *v.* Washington (31 S. W. Reporter, 614) the supreme court of Texas held that a contract concerning a right or title to be acquired in the future is valid and enforceable. See also authorities in our alphabetically indexed brief, pages 22 to 26.

We think these decisions fully sustain our position that on November 1st, 1882, Russ possessed a right with regard to which he could make a valid contract.

The expression in White *v.* Martin (66 Texas, 343), that

"the act itself indicates a desire to raise money by sale,"

shows that it was to the interest of the State not to restrain the traffic in these lands, but in every way to encourage it so as to raise money by the sales. We respectfully submit that it is doing our client great injustice for the highest court in the world to assert that the claim of our client Russ

"does not merit consideration,"

and

"As a claim it rests upon no solid foundation."

The record is uncontradicted in this: 1. That Russ filed his applications as required by law to purchase certain lands. 2. That Telfener by his agents examined the records and found the applications to be valid and legal. 3. That Telfener purchased of Russ the rights Russ had acquired. 4. That Telfener then held himself out to capitalists as the owner of said lands. 5. That Russ, at great personal expense, completed the survey of said lands, and filed the surveys in the Texas land office. 6. That the officials of Texas adjudged the application, surveys,

and files to be according to law. 7. That had Telfener paid the 50 cents per acre to the State and the 25 cents per acre to Russ he would have acquired perfect title to the land. 8. That Russ complied fully with his contract, and that Telfener was wholly in default.

The decision also says (page 5):

"Third. That the testimony contained in the record of the cause "further shows that none of the sections which Russ alleged that he had "requested to be surveyed, and had obtained a survey thereof, were sur- "veyed on the ground, but that which was alleged to be a survey of the "sections and returned as such consisted of work done in the office of "the Commissioner of the General Land Office and presented as a "survey."

We respectfully insist, on the contrary, that the only evidence set out in the record on this point is as follows:

1st. A sworn officer, the surveyor, certified to each of the surveys.

2d. The evidence of S. W. S. Duncan, who testified that, as agent of the plaintiff, he made application and filed on the 1,813 sections referred to in this suit. He testified as follows (Record, page 34):

"I made a contract for plaintiff with the county surveyor of El Paso "county for making the surveys of said sections. There was employed "by me in the survey and making the field-notes, between 20 and 30 "people altogether. I employed the county surveyor, and all of his "assistants and myself helped in making the survey and superintending "the matter from making the application to finally turning the field- "notes over to plaintiff to file in the General Land Office. I do know "that the survey was made and the field-notes returned to the General "Land Office, because I superintended the survey and helped to take "the field-notes to the office, and saw plaintiff pay the filing fee of ($1) "one dollar per section."

Here is positive, undisputed evidence that the surveyor of the county and all of his assistants were employed in making the surveys. The evidence shows that the surveyor had a large number of surveying parties, and even Mr. Maddox testifies (page 33)—

"that the more surveyors you have, the more work you can do; that one "surveyor could sorter supervise the other surveyors, but that he could "not be with each surveying party, but could direct their general move- "ments; that the amount of work that could be done would increase ac- "cording to the number of surveyors employed at a specified time, and "the number of sections one surveyor could survey depends upon the "number of men he has with him; and that the additional number of "men would facilitate the surveyors in crossing streams, making set- "offs, etc."

On redirect examination the witness testified with regard to surveying by—

"making only two corners to each section."

Upon recross-examination witness said—

"that would be actual surveying on the ground; that is, what is termed "actual surveying on the ground is work done on the ground by which "you could identify a survey. This work would be that kind."

The substance of Maddox's testimony appears to be that all this land could not, in his opinion, have been surveyed on the ground in the time stated by fixing four corners and running four miles for each section; but he also testified that such work was not necessary to constitute a survey on the ground.

It was directly decided by Chief Justice Marshall, 4 Cranch, 431, that evidence of the character of that given by Maddox could have no weight to invalidate a survey.

Chief Justice Marshall said:

"The surveyor was a sworn officer. This is an attempt to invalidate "the evidence derived from his official return, by a particular fact which "has no relation to the cause before the court, and with which the par- "ties to this controversy have no connection."

But if there were merit in the contention of counsel for plaintiff in error, the question was not properly raised in the trial court.

The only bill of exception which raises any question with regard to making the surveys is exception No. 4, pages 32, 33, and 34, and the court will see that it does not

that the second contract, which provided that Russ should

"pay all the fees required to be paid,"

never became operative.

The reason it did not become operative was that Telfener defaulted and failed to pay the 25 cents an acre to Russ on November 15.

The language of Telfener's answer is (Record, page 15):

"Defendant specially excepts to said petition as follows: To so much "and to such portions and allegations of said petition as seek a recovery "of damages for anything done by plaintiff or any expense incurred by "plaintiff in carrying out or attempting to carry out by plaintiff any of "the terms or provisions of the contracts in said petition mentioned "after the 15th day of November, 1882."

The United States court in the trial sustained Telfener in his contention, and charged the jury (Record, page 19) that the plaintiff Russ cannot recover of defendant Telfener any damages because of a breach of the contract which is marked Exhibit "N."

Again, the court is mistaken in its averment that Telfener set up as a defence that Russ never

"made or tendered any payment for the same"

(referring to the land.) Russ did pay all that was required to be paid by the third section, which is the only section referred to in the quoted paragraph, and the record, page 2, shows that Telfener was to pay the 50 cents per acre as required by section 5.

In one part of the decision (page 4) the opinion says:

"The plaintiff below could not convey any proprietary interest in the "whole amount of the lands desired until the required payment therefor "was made."

We respectfully submit that this assertion could not have been intended, and no such contention was made by Telfener's counsel in the court below. The decision substantially admits that this was not intended, because on page 6 it says that Russ was to acquire such a title—

" that the defendant (Telfener) might have the right to demand patents " of the State on payment of the purchase money of such property to its " treasury."

We deny that the contract contained any such stipulation, but we quote this to show that the court did not intend to hold that it was necessary for Russ to pay the 50 cents per acre in order to possess an assignable interest in the land.

There are other serious errors in the opinion, but we feel that the court will grant a rehearing from those we have cited.

We call attention to the following allegations and averments of the complaint. They were denied in the answer, and were therefore put in the issue and were found by the jury in favor of the plaintiff, Russ ; therefore the evidence proved the averments to be true.

1st. That when Telfener applied to Russ to purchase of Russ his interest in the land,—

" Plaintiff (Russ) having not yet paid to the State of Texas the fifty " cents per acre to which said State was entitled, and defendant (Tel- " fener) offering to assume such payment to the State, and desiring sim- " ply to contract with plaintiff for the purchase and assignment of " plaintiff's right to purchase from the State, they—*i. e.*, the plaintiff in " person and the defendant by his agent—at the city of Dallas, Texas, " on the 1st day of November, A. D. 1882, executed a written contract—" (Record, page 2.)

Therefore Telfener, not Russ, was to pay the 50 cents per acre to the State.

The contract which is a part of the complaint said (R., p. 9) :

" The said Count Telfener, for the purpose of ascertaining whether " the said application for purchase has been regularly and properly " made as aforesaid, and according to the provisions of said law, and the " amount of land covered by or embraced within such application, shall " proceed at once and inspect the records and files of the surveyor's " office of El Paso county, at Ysleta, and the map of said county in said " office. If it shall be there shown that the said application and files

pretend to state that all the evidence on that point is set out, and it is held in 156 U. S., 576, that this error should decide the case in favor of Russ. See our brief with alphabetical index, page 59.

The record is brought here by Telfener, who only included such evidence as is to his advantage.

The court then says (pages 5 and 6):

"Fourth. But assuming that the plaintiff finally pursued fully all the "proceedings required to obtain a right to purchase of Texas the "whole amount of her unappropriated lands claimed, namely, one mil- "lion one hundred and sixty thousand three hundred and twenty acres, "and the contract alleged between Russ, the plaintiff, and Telfener, the "defendant, was made, yet such contract was conditional and dependent "upon the performance by the respective parties of the conditions de- "volving upon each party at the time stipulated, and ceased to be bind- "ing upon either one on the failure of the other to comply with the "performance stipulated on his part, Russ, the plaintiff, was to acquire "of the State such interest in the property as would authorize him to "sell and transfer to the defendant a valid title thereto, and to acquire "such a valid title he was bound to make performance of his contract "with the defendant by filing the surveys, map, and field-notes of the "whole within the prescribed time, so that the defendant might have "the right to demand patents of the State on payment of the purchase- "money of such property to its treasury, which he never did, and there- "fore released the defendant of all obligations to perform the alleged "contract on his part."

We respectfully submit that this assertion in the opinion is not supported by the evidence. The contract Exhibit M (Record, pages 9 and 10) specially stipulates that not Russ, but that—

"the said Count Telfener shall proceed, without delay; and have said "lands surveyed and platted, and the field-notes thereof returned and "filed according to the provisions of said law."

The second contract, Exhibit N, does not bind Russ to have the surveys made except in the event that the sale and transfer shall be made under the contract as aforesaid, meaning the contract Exhibit M, and the contract Exhibit M stipulated that the payment of 25 cents an acre

was a precedent to Russ transferring and assigning his titles.

Now, we respectfully insist that although Russ was not bound by the contract to comply with the stipulations in Exhibit "N," because of the failure on the part of Telfener to pay him the twenty-five cents an acre, yet we respectfully submit that Russ did comply with every stipulation contained in said Exhibit "N."

The record shows (pages 33 and 34) that he had the land surveyed, and filed the field-notes in the General Land Office, as required by law, and paid the filing fee of $1.00 per section. This is positively testified to, and there is no evidence contradicting it.

The court, in its opinion, also said (page 4):

> "He (Telfener) answered the petition * * * averring that—
> "Russ never acquired by his applications any right or interest in the "land, the right to purchase which he claimed to have sold to the de- "fendant, the survey, map, and field-notes never having been returned "to the General Land Office as required by the third section of the "statute of Texas, and he never having made or tendered any payment "for the same as also required by that section, and that any interest thus "acquired was without any tangible or appreciable value."

The court is mistaken in this assertion. No such defence was set up. No such averment was made. So far from making any such contention, the attitude assumed by Telfener upon this point was precisely the reverse from that stated in the opinion. The record shows (pages 29, 30, and 34) that Russ did file the field-notes, and that he did pay the filing fees.

We insist that, so far from denying this or making the averments as stated in the opinion, the answer of Telfener sought to defeat a recovery for this and all other expenditures incurred by Russ after November 15.

The ground which Telfener assumed on this point was

" thereof have been regularly and properly made in such manner as, " under the terms of said law, would entitle the said Russ to become the " purchaser of said lands from the State of Texas—"

Then follows an agreement that the number of acres embraced in the applications shall be ascertained.

The contract then says (Record, page 10):

" The number of acres being ascertained by approximation, in manner " aforesaid, and said application being found good and regular, as afore- " said, the Count Telfener agrees to pay to the said Russ in cash, in the " city of Dallas or the city of Austin, Texas, as said Russ shall prefer, " ninety per centum of the said purchase price so agreed upon, as aforesaid, " for the number of acres so ascertained approximately, as aforesaid; " and the said Russ agrees and binds himself that upon such payment " being made he will execute and deliver to said Count Telfener any and " all deed or deeds or other instruments that may be proper or necessary, " conveying, transferring, and assigning unto the said Count Telfener " all and singular the rights, titles, and interests that the said Russ now " has or may be entitled to in and to said lands by reason of such applica- " tion and files—"

The complaint also avers and alleges (Record, page 4):

" And plaintiff alleges that, pursuant to and in performance of said " terms of contract hereinbefore immediately recited, the plaintiff in per- " son, and the defendant by his duly authorized agents, repaired to " Ysleta, El Paso county, Texas, on the 3d day of November, 1882, and " then and there inspected the records and files of the surveyor's office " of El Paso county, Texas, and the maps of said county in said surveyor's " office, and the application of plaintiff for purchase and survey of said " Pacific reservation lands; and that as a result of said inspection defen- " dant found, and plaintiff avers, that the said application and files had " been regularly and properly made in such manner as under the terms " of said laws of the State of Texas would entitle the plaintiff to be- " come the purchaser of said lands from the State of Texas—"

This proves that the jury found—

" That the said application and files had been regularly and properly " made in such manner as under the terms of said laws of the State of " Texas would entitle the plaintiff to become the purchaser of said lands " from the State of Texas—"

The complaint then alleges (Record, p. 5):

"And plaintiff further avers that on and prior to the 15th day of No-
" vember, 1882, the defendant, having full knowledge of said inspection
" and approximation, and knowing himself to be indebted to plaintiff in
" said sum, and having in his possession the duplicate of said contract
" (which had been executed in duplicate), was notified by plaintiff that
" he, the plaintiff, would be present at the city of Dallas, Texas, on the
" 15th day of November, A. D. 1882, for the purpose of receiving from
" the defendant said ninety per centum of said purchase-price and for
" the execution to the defendant of any and all deeds or other instru-
" ments proper or necessary to convey, transfer, and assign to the de-
" fendant all and singular the rights, titles, and interests that the plaintiff
" had or was entitled to in and to said lands by reason of such applica-
" tion and files, and to bind himself by such conveyance, by covenant
" of warranty, against all persons claiming or to claim said land or any
" part thereof by, through, or under the plaintiff; and the plaintiff
" further avers that on said 15th day of November, 1882, he, plaintiff,
" was present at his office, in the said city of Dallas, Texas, during the
" whole of said day, for the purpose of receiving from the defendant said
" payment of ninety per centum, and for the purpose of executing to said
" defendant a conveyance in every respect conforming to the require-
" ments of said contract, as hereinbefore recited, but that the defendant,
" without any explanation of his absence, and without any denial of his
" liability under said contract, and without in any manner asking delay
" or postponement, and without any request for modification, amend-
" ment, or recession [rescission] of said contract, and without notifying
" the plaintiff as to defendant's whereabouts, wholly failed to appear in
" the city of Dallas, Texas, and utterly and entirely failed, and has to
" this time utterly and entirely failed to pay to this plaintiff any part of
" said purchase-price."

We respectfully submit that this proves that the following facts are established by the record:

1. That Telfener was to pay the 50 cents per acre to the State.

2. That Telfener was to ascertain if the files, &c., were such as would entitle the said Russ to become the purchaser of the said lands.

3. That Telfener, by his agent, did inspect said files and found they had been regularly and properly made as would entitle Russ to become the purchaser of said lands.

4. That Telfener was to pay 90 per cent. of the purchase

money on November 15, and that Russ was then to assign his rights, titles, &c., to him.

5. That plaintiff, with full knowledge of these facts, defaulted and failed to comply with his contract.

6. That to the great injury of Russ (Record, page 8), Telfener

"held himself out to capitalists as being the owner of said contract, viz., "the contract Ex. M."

7. That Russ was during all this time ready and able to fully comply with his part of the contract.

We ask the court to read carefully the contract between Russ and Telfener (Record, page 9). Also the decision of the supreme court of Texas in Graham *v.* Henry, 17 Texas 164. Also the statute of December 14, 1837. These are printed on pages 32 and 33 of our brief, which has an alphabetical index. Also the case of 41 Texas, printed on page 24 of same brief. In the case of Graham *v.* Henry, the law gave a conditional grant of 1,280 acres to a free white person, who was the head of a family, by paying the fees of office and surveying, the conditions being that the grantee and his family should reside within the Republic for three years and perform all the duties required of other like citizens.

The court held that a claim to land thus acquired was transferable, even though the party had just acquired the right by occupancy, &c.

The court said:

"Any incipient title or contingent interest which is susceptible of be-"ing ripened into a title to lands may be assigned; and such has been "the usage in this and other countries."

"It has never been supposed necessary to consummate the title before "the right could be assigned."

We respectfully insist that after Russ had applied for the land in question in this suit and filed his applications

as the law required, he had such a potential interest in the land as could be assigned. Telfener understood the matter in this way and contracted with Russ for the transfer to him of such interest as Russ then had or might have in said land.

But Russ' position is much stronger than this. The record shows that Russ had caused the land to be surveyed and the record (pages 30 and 34) shows that the surveys were completed prior to November 15th, the day he was to transfer his titles.

As the record clearly shows that Russ was never in default, the authorities on pages 6 and 7 of the opinion have no bearing upon this case, and we respectfully submit that the question of the rights of parties as to damages is properly laid down in the Anvil Mining Co. case, quoted pages 13 and 14 of our alphabetically indexed brief, and in the case of Lakeshore *v.* Richards, and cases cited in notes thereto, printed in "Lawyers' Reports Annotated" for January 15, 1896, pages 33 to 60.

We respectfully submit that a case could hardly be presented to the court where the equities were so entirely on the side of Russ, the plaintiff in the court below. As this is a case of great importance, we most earnestly beg that each member of the court will read this petition, and at least that part of the record to which it refers. We also respectfully request that the court will read that part of our alphabetically indexed brief which discusses the three assignments of error, pages 19 to 45, and also our answers to the oral questions of the court, pages 46 to 61. We feel embarrassed to ask this of the court, overburdened as it now is, but we feel that the disaster to our client's cause is due in a great measure to the court being taxed by the great pressure upon it almost beyond human endurance.

We feel confident the court will concur with us that

when an opinion contains so many errors, the only way to do justice will be to set the decision aside and grant a rehearing.

All of which is respectfully submitted.

CLARENCE H. MILLER,
JOSEPH WHEELER,
For Petitioner.

I certify that the foregoing petition and brief is presented in good faith, and in my opinion is well founded in law.

JOSEPH WHEELER.

IN THE

Supreme Court of the United States.

OBTOBER TERM, 1895. No. 462.

COUNT JOSEPH TELFENER, PETITIONER,

vs.

GEORGE W. RUSS.

Brief and Argument for Defendant in Error, George W. Russ,

ON RE-HEARING.

March 3, 1896.

JOSIAH PATTERSON AND
JOSEPH WHEELER,
Attorneys for Defendant in Error.

Reprint, with "Table of Contents" and "Alphabetical Index."

GIBSON BROS. PRS. WASH.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

COUNT JOSEPH TELFENER,
PETITIONER,
v.
GEORGE W. RUSS.

No. 462.

Brief and Argument for Defendant in Error, George W. Russ.

STATEMENT OF THE CASE.

1st.

Under and by virtue of a law of the State of Texas, Geo. W. Russ, the defendant in error, by complying with the provisions of said law, had prior to the first day of November, 1882, become the sole owner of a valuable interest in 1,160,320 acres of land in the State of Texas.

2d.

On November 1, 1882, Count Joseph Telfener, the plaintiff in error, by his agents, contracted with Russ (Ex. M., Tr.,

p. 9) to purchase from him all the right, title, and interest which the said Russ had or might be entitled to in said land at and for the sum of 25 cents per acre, the said Count agreeing to proceed at once to inspect the records of Russ's applications and files, and if said records and files showed that said applications and files had been regularly and properly made so as to entitle Russ to become the purchaser of said lands, the said Count Telfener agreed to pay the said Russ, in cash, 90 per centum of the said purchase price for the number of acres embraced in or covered by Russ's applications and files. It was further agreed that the Count's inspection should be completed before the 15th of November, 1882, and that the Count should not be entitled to any delay after that time for making the payments aforesaid.

The Contract.

The material points of the contract Exhibit M are as follows (Tr., p. 9):

1st. "Whereas said Russ claims to have made application in due form "for the purchase of about 1,000,000 acres of land, more or less, in El "Paso county, Texas, from the State of Texas, under and by virtue of an "act of the legislature of Texas, approved July 14, 1879, providing for "a sale of a portion of the public lands of Texas at 50 cents per acre, "and the amendments to said act."

2d. "And whereas the said Count Telfener is desirous of purchasing "from said Russ all his rights, titles, and interests under and by reason "of such application, provided it shall appear that such application "has been regularly made and filed in such manner as will, under the "terms of said law, entitle the said Russ to become the purchaser of the "said lands from the State of Texas."

3d. "In such case (Count Telfener) has agreed and promised to pay to "said Russ, as consideration of his sale, transfer, and assignment of all "his said rights, titles, and interests, 25 cents per acre for each and every "acre of land covered by his said application."

4th. "And the said Russ has agreed and bound himself, in considera- "tion of said price and sum to be paid to him, to sell, transfer, and assign "unto the said Count Telfener all his rights, titles, and interests in said "lands acquired by his said applications and files."

Tr., p. 10 :

5th. The Count then agreed to proceed at once to inspect the records and files, and "the number of acres being ascertained by approximation, " in manner aforesaid, and said application having been found good and " regular as aforesaid, the said Count Telfener agrees to pay to the " said Russ in cash, in the city of Dallas, or the city of Austin, Texas, as " said Russ shall prefer, ninety per centum of the said purchase price " so agreed upon as aforesaid for the number of acres so ascertained ap- " proximately as aforesaid."

6th. "And the said Russ agrees and binds himself that upon such pay- " ment being made he will execute and deliver to said Count Telfener " any and all deed or deeds or other instruments that may be proper or " necessary, conveying, transferring, and assigning unto the said Count " Telfener all and singular the rights, titles, and interests that the said " Russ now has or may be entitled to in and to said lands by reason of " such application and files, binding himself by covenant of warranty " against all persons claiming or to claim the same, or any part thereof, " by, through, or under him."

7th. The contract provided that the Count should complete his inspections " on or before the 15th day of November, 1882, and that the said " Count Telfener shall not be entitled to any delay beyond that time for " said purposes, and for making the payment aforesaid.

8th. "After the transfer and assignment as aforesaid shall have been " made by the said Russ, the said Count Telfener shall proceed, without " delay, and have said lands surveyed and platted and the field-notes " thereof returned and filed according to the provisions of said law."

9th. Provides that when the actual number of acres had been ascertained the balance due should be paid to Russ.

3d.

By another contract made on the same day (Exhibit N, Tr., p. 11), it was agreed and stipulated between said Telfener and said Russ that, whereas it would be necessary to complete the surveys of said lands, etc., that if the sale and transfer shall be made as provided for by (the) said contract (Exhibit M), the said Russ would, at his own proper cost and expense, make all the surveys, etc., of said lands and pay all the fees required to be paid ; and the said Count Telfener agreed and bound himself to pay

said Russ 5 cents per acre for the services rendered and payments made by said Russ in making the surveys, maps, etc., of said land.

It will be observed that this contract, Exhibit N, was only to become operative after the consummation of two provisions stipulated for in Exhibit M, namely:

The stipulation in paragraph as above numbered 3 by which Telfener was to pay Russ 25 cents per acre for the land, which was a preliminary to the transfer and assignment by Russ to Telfener of all his rights, titles, etc., as provided in paragraph above numbered 4.

4th.

The Count failed to comply with his contract and did not pay for the land or any part thereof on November 15th or at any other time.

Therefore Exhibit N never became operative, and after November 15th Count Telfener was bound by all of his stipulations contained in the contract Exhibit M.

Russ was therefore relieved from any obligation to have the land surveyed, but, nevertheless, trusting that the Count would finally comply with his contract, he proceeded at great expense to complete the survey of said lands.

The failure of Count Telfener to comply with any part of his contract (Exhibit M) caused the lands to revert to the State, thus resulting in a total loss to Russ.

5th.

Russ sued Count Telfener in the State court of Texas; the case was removed to the United States court. Judgment was rendered against Telfener and in favor of Russ.

6th.

A writ of error was sued out in the Supreme Court of the United States, and upon hearing and argument two questions were presented. (1st) Whether the plaintiff below, the defendant in error in the Supreme Court, acquired any assignable interest in the real property described in the contract upon which the action is brought.

Upon this point the court said:

"That if a right to purchase land for however short a period is vested "in one, it is a valuable right, and is, in that sense, property, and in the "absence of express prohibition would be, therefore, assignable."

(2d) The other question presented was:

"Assuming that he (plaintiff Russ) had an assignable interest, whether "the rule for the measure of damages for breach of the contract for such "interest by the defendant was correctly stated to the jury by the "court."

This court held that the judge who tried the case in the United States circuit court erred in his charge as to the proper measure of damages sustained by Russ, and upon this ground judgment was reversed.

7th.

The case was again tried by the United States circuit court, and on July 12, 1893, judgment was again rendered in favor of Russ and against Count Telfener.

8th.

Count Telfener then sued out a writ of error to the United States circuit court of appeals, and after a full hearing, on January 24, 1894, the judgment of the circuit court of the United States was, on February 6, 1894, in all things affirmed.

9th.

On March 7, 1894, a petition for rehearing was entered and filed, and after a full consideration of the case a decree was rendered by the court of appeals, still adhering to its decision affirming the judgment of the United States circuit court, and mandate duly issued to the circuit court.

10th.

Plaintiff in error thereupon petitioned for and obtained from this court a certiorari, and in compliance therewith the case is now certified to this court for its revision and determination from the United States circuit court of appeals for the fifth circuit, by virtue of section 6 of the act approved March 3, 1891, entitled "An act to "establish circuit courts of appeals and to define and regu- "late in certain cases the jurisdiction of the courts of the "United States, and for other purposes."

THREE ASSIGNMENTS OF ERROR.

The record as certified to the circuit court of appeals contained six assignments of error. The 1st, 2d, and 6th assignments were abandoned by plaintiff in error in his petition for certiorari, and the only questions which are now assigned as error are the refusals of the judge to give the jury special charges, numbered 13, 14, and 16, as requested by the plaintiff in error

CONTENTIONS OF PLAINTIFF IN ERROR.

The first point insisted upon by the plaintiff in error is the 3d assignment of error, namely:

"The court erred in refusing to give to the jury defendant's special "charge number 13, which is as follows:"

"The court instructs the jury that the 'right, title, "and interest' of plaintiff, in his application and files on "lands, and which he contracted to sell, was not a "vested right on the first day of November, 1882, in or "to any land surveyed after that date. The acceptance "by the surveyor of plaintiff's application for land in- "vested plaintiff with no right that he could sell, and for "such sections of land surveyed after said November "first, 1882, you will not consider or include in the "measure of damages."

2.

The next point insisted upon and argued by the plaintiff in error is the 4th assignment of error:

"The court erred in refusing to give to the jury defendant's special "charge number 14, which is as follows:"

"You are instructed that the law required the field- "notes of the land to be returned to and filed in the "General Land Office within sixty days after the same "was surveyed. The evidence shows that the field-notes "of only twenty-four sections of land were returned to "and filed in the General Land Office within said sixty "days, therefore the court charges you that you can "only consider plaintiff's right in twenty-four sections "of land."

3.

The next point insisted upon and argued by the plaintiff in error is found in the record as the 5th assignment of error:

"The court erred in refusing to give to the jury the defendant's special "charge number 16, which is as follows:"

"If the jury find from the evidence that any of the sec- "tions of land described in plaintiff's petition were not "actually surveyed on the ground, then and in such "case they are instructed that such surveys are void "and for such sections plaintiff cannot recover; and if "the jury should find that none of said sections were "actually surveyed on the ground, then they are in- "structed to return a verdict for the defendant."

Points Involved.

All three of these contentions involve practically the same legal question, and can be answered with the same argument.

The Record, pages 8 and 15 and 19, shows that the judgment was based upon the breach by Telfener of the contract referred to as Exhibit "M." This was a contract of sale by Russ to Telfener of all the right, title, and interest which Russ had on November 1, 1882, or that he might become entitled to in said 1,000,000 acres, more or less, by reason of certain applications made by the said Russ and duly filed in the surveyor's office of El Paso county, for the purchase of land under the act of July 14, 1879, and amendments thereto.

The contract especially provided that after the transfer and assignment the said Count Telfener should proceed without delay to have the land surveyed, etc., as required by law.

This shows that the duty of perfecting the title to the land was specially assumed by Count Telfener.

It is true that afterwards, by another contract, marked Exhibit "N," page 11, it was stipulated that if sale and transfer should be made as provided for in the former contract, the said Russ should assume the burden of completing the surveys at and for the sum of five cents per acre.

Now, as the Count failed to comply with his contract on November 15, as stipulated, the condition upon which Russ bound himself to complete the surveys under the second contract never became operative and never had any existence. This court has already settled that point, 145 U. S. Courts, page 533, as follows:

"On the 15th of November he (Russ) possessed all the right to the "land which he ever possessed, and assuming that the defendant then

" failed to make the payment which he had agreed to make, all the dam-
" ages suffered by the plaintiff was the difference between the value of
" the right, as stipulated to be paid, and the amount which could then
" have been obtained on its sale."

The court of appeals expresses itself very clearly upon this point (Tr., p. 49).

Now, if it was not incumbent upon Russ to survey the land at all, nor to file the field-notes in the land office, it certainly makes no difference how the surveys were made or when the returns were filed or whether the surveys were made before or after the date of this contract.

To recapitulate, the complainant, Tr., page 8, claims the purchase price for the assignment, 25 cents an acre, in accordance with contract "M," and, in addition, 5 cents an acre for surveying lands, filing field-notes, maps of said surveys, etc., as per contract "N," which amounted to $58,016.

The defendant's answer, Tr., page 15, excepts to so much of the complaint and the allegations of the petition of complainant as seeks a recovery of damages for anything done by plaintiff, Russ, or any expense incurred by him in carrying out any of the terms of the contracts after the 15th of November, 1882.

Tr., page 19, the court charged the jury sustaining Count Telfener on this point, and instructed the jury that plaintiff could not recover of defendant any damages because of a breach or supposed breach with reference to Exhibit "N," Exhibit "N" being the contract under which Russ expended the money and did the work for which he was to receive $58,016.

There is no contention and has been no contention in any of the trials that there was any infirmity in the applications for purchase by Russ. It is therefore admitted that his applications for purchase were regularly and properly made according to the provisions of the law.

In point of fact, twenty-five sections which were included in the applications were of necessity regular in all respects, because the transcript shows, Tr., page 30, that the applications for surveys of sections 1 to 16, inclusive, in block G, and 35 to 44, inclusive, in block I, were completed in all respects, and patents were issued by the State of Texas. All the applications were precisely similar to the applications for the above-named tracts which were adjudicated by the State of Texes to be regular, and therefore this shows that they all were regular.

Now, singular as it may appear, every one of the pretended infirmities and defects which are set up as a defence by plaintiff in error attached to these 25 sections of land.

They were surveyed on the 3d of November, 2 days after the contract was made.

The field-notes were not filed in the Land Office until the 8th day of January, 1883, 6 days after the 60 days had expired.

That failing to file the field-notes within 60 days is no infirmity is decided in New York and Texas Land Co. *v.* Gardner, Texas Court of Civil Appeals of Texas, Oct. 23, 1895, 32 Southwestern Reporter, p. 787.

Now, as the Commissioner of the Land Office adjudged and decided that these applications and filings were free from infirmity, it must be taken as proof that there was no infirmity or irregularity in the applications, surveys, and filings with regard to the other sections.

On page 34 of his brief, the eminent counsel for plaintiff in error (Mr. Kent) says :

> "We beg leave to intimate to this honorable court and to the learned "counsel for the defendant in error that we perceive in this transaction "some indication of bad faith."

I had hoped that this case would have been conducted

by simply arguing the questions which were assigned for error—the only questions which this court can properly consider.

I challenge the gentleman to point to any word or line in the record by which any man can perceive any indication of bad faith on the part of George W. Russ, "the defendant in error" in this cause, and I challenge him to show one word or line of evidence in this record to justify the plaintiff in error, Count Telfener, in violating his agreement to pay for this land and receive the assignment from Russ on November 15, 1882.

Unless he can point to some word or line of evidence to justify his client in violating a solemn contract, he must admit that the bad faith he perceives must attach to his client, and to his client alone.

It may seem inexplicable to the court why the plaintiff in error, Count Telfener, failed to comply with the contract and pay Russ the money as stipulated on November 15, 1882.

WHY DID TELFENER NOT COMPLY WITH HIS CONTRACT?

Some light is thrown upon this, Tr., pages 44 and 45. In his anxiety to minimize the value of Russ's right to the land, Telfener's attorney says:

"Section 9 of the act provided that should applicant fail, refuse, or "neglect to pay for the land, he should forfeit all rights thereto and "should not thereafter be allowed to purchase the same. Now did this "forfeiture and prohibition apply to the plaintiff in error? Certainly "not, because he was not an applicant—he had not made any application, "nor had he caused any lands to be surveyed and the field-notes of same "returned to the General Land Office. After a forfeiture had been de-"clared, the plaintiff in error could have filed on these identical lands "and have purchased them."

Not only could Telfener have done that, but by leading Russ to believe that he would still comply with the con-

tract, he could have withheld the payment from the State until the 60 days expired, and the moment these 60 days expired, he could have used the same money and become the purchaser of the land from the State at 50 cents an acre as provided for by section 9, which says that in case an applicant who has had land surveyed and does not pay the 50 cents—

"the land so surveyed may be sold by the Commissioner of the Gen-
"eral Land Office to any other person, firm, or corporation who shall
"pay into the treasury the purchase money therefor."

By this means Telfener would have obtained the land and Russ would have been compelled to sue for the 25 cents per acre. It seems very probable that Telfener had some such intention.

The record does not show that there was one particle of evidence introduced giving any reason or justification or excuse on the part of Telfener for not complying with his contract and paying 90 per cent. of the 25 cents per acre to Russ on November 15.

There is nothing in the record to show that Count Telfener's desire to purchase the lands was any less on November 15 than it was on November 1.

There is nothing in the record to excuse the Count from complying with his contract.

Even if financial troubles had made it difficult for the Count to pay promptly on November 15, he should have notified Russ, and thus have given Russ an opportunity to sell to another. Count Telfener having by his own acts prevented the contract, Exhibit "N," from becoming operative, then the first contract, Exhibit "M," immediately became restored to its full force and effect, and although the Count failed to comply with that part of the contract which stipulated for the payment to Russ on November 15, this did not excuse Count Telfener from complying

with that part of his contract, Exhibit "M," which stipulated that he,

"the said Count Telfener, shall proceed without delay and have said "lands surveyed and platted, and the field-notes thereof returned and "filed according to the provisions of said law."

Tr., p. 10.

Measure of Damage.

Count Telfener and his authorized agent knew that damage was being suffered by Russ every day that the payment was delayed after November 15, and it was his duty to make that damage as little as possible by paying for the land and filing the field-notes in accordance with his contract. This he did not do, and I ask the court to note the fact that the entire defence set up here is based upon an alleged neglect upon the part of Russ to properly survey the lands, and promptly file the notes in the land office, a duty which, under the conditions created by Telfener, devolved upon him (Telfener) and not upon Russ.

How different the conduct of Russ. He was ready on November 15th, and ever since that time, to assign and transfer to Telfener, and notwithstanding Telfener's failure to pay him the money, in his anxiety to lessen the damage as much as possible, and as far as possible prevent damage to Telfener, Russ proceeds to and causes surveys to be completed, the land to be platted, and the field-notes thereof returned and filed in the land office, paying at the same time $1 per section.

Tr., p. 34.

This court has laid down the rule which should govern the amount of damages due Russ in a breach of contract like this. In Anvil Mining Co. *v.* Humble (153 U. S. 551 and 552) this court says :

"Whenever one party thereto is guilty of such a breach as is here at-
"tributed to the defendant, the other party is at liberty to treat the
"contract as broken, and desist from any further effort on his part to
"perform; in other words, he may abandon it and recover damages—the
"profits he would have received through full performance. Such an
"abandonment is not technically a rescission of the contract, but is really
"an acceptance of the situation which the wrong-doing of the other party
"has brought about."

In this brief argument it will be seen that we have confined ourselves strictly to the Record. For the court to have given the charges numbered 14 and 16, page 38, would have instructed the jury that Russ was bound by the stipulations of contract, Exhibit "N." This the court could not do, because it had previously charged the jury that Exhibit "N" had never become operative, and that therefore Russ could not claim any damages under said agreement cited in Exhibit "N."

INCONSISTENT CONTENTIONS.

This action on the part of Telfener in insisting that everything be excluded from the case regarding Exhibit N one moment in order to defeat a recovery against him for $58,016, every dollar of which was probably expended in solid cash by Russ, and the next moment seeking to bring back to the case this same dead Exhibit N, and using it for the purpose of contending that he is excused from paying the 25 cents an acre because the contract N was not, as he (Telfener) contended, carried out strictly according to the law, is cutting both ways, which may be admissible in war and is sometimes indulged in in politics, but never in the court of justice.

In one breath Count Telfener contends that Russ cannot recover the $58,016 which Russ expended in surveying the land as contracted for in the 2d contract (Exhibit N), for the reason that as he, Telfener, violated his first

contract (Exhibit M) and failed to pay Russ for the land on November 15, the 2d contract (Exhibit N) did not come into operation, and therefore Russ had no right to comply with its provision and survey the land, and in the next breath he insists that Russ cannot recover the 25 cents per acre contracted to be paid in the first contract, for the reason (as he contends) that Russ did not fully comply with all the stipulations of the said 2d contract.

The Value of Russ's Claim.

Plaintiff in error seeks to minimize the loss sustained by Russ, in consequence of Telfener's failure to comply with the contract Exhibit "M."

The record shows that he is damaged $286,080, which it is clear was the value of his right at the time he sold to Telfener. He also lost $58,016, which was estimated at the time to be the cost of the survey of the 1,140,320 acres. He also lost the $1,788 (Tr., p. 34) which the evidence shows he paid in cash when the surveys were filed in the land office. But we insist that this is not a question in the case. Had it been, it would have probably been easy in the court below to show that Russ and his associates had spent many months in examining these lands to determine which lands were most valuable, and confining his selections to that character of land. Had that been a material question he could no doubt have shown that the lands selected by Russ and his associates were especially valuable on account of their water advantages. The telegrams which appear in the record show an anxiety on the part of Count Telfener to secure these lands, and most probably it was because he and his agents were well aware of their value and advantages.

Similar Cases.

A purchases a tract of land upon which there rests a mortgage or vendor lien, amounting to 50 cents an acre. He contracts to sell or assign his titles, &c., &c., to B, who agrees to pay him 25 cents per acre for the claim or title of A to the lands; B of course assumes the debt of 50 cents per acre.

B fails to pay the debt and the land reverts.

Would any one contend that B could escape his liability to A for the 25 cents per acre, or that A did not have a right to sell his titles to B?

Again, take for instance a case of a chancery sale. The bidder has a right which is paramount to any one else, and yet this right may fail to ripen into a purchase, because the chancellor may not confirm the sale, but pending the action of the court the bidder has a right to sell or assign his bid. I believe his right has never been questioned in any court. Would any one contend that he could not recover the price for which he contracted to assign his bid?

Still again, take the instance of a poor miner who is fortunate enough to stake off a very valuable gold mine. It may prove to be worth $10,000,000. Now, before in all respects perfecting his title, he may contract to sell it for $10,000,000. In a suit to enforce this contract the defendant would not be permitted to put in evidence the fact of the little cost of the mine to the fortunate miner who had become possessed of it under the laws of the United States.

We have the same case here. Russ by his labor and skill selected some 1,800 sections of valuable land, excluding from his selections worthless lands. This knowledge acquired by labor on the part of Russ was as valuable to

him as a lawyer's professional knowledge is valuable to him.

The lawyer sells his professional knowledge and the courts jealously uphold his right to sell it, and the courts would equally uphold Russ in his right to sell his labor and knowledge which enabled him to select these lands.

The very ably written brief by Mr. Kent says:

"The interest which the defendant in error undertook to sell to the "plaintiff in error was not assignable."

It will be seen from this statement and the argument which follows it, page 7 and sequence, that he is going beyond the question before the court.

I respectfully submit that the only question for this court to determine is as to the three assignments of error. The question before the court is, does the record show that the trial judge committed an error in refusing either of the three charges, numbered 13, 14, and 16, as contended by the three assignments of error?

Now, under the contract Russ agreed, in consideration of 25 cents per acre to be paid him by Telfener, to sell, transfer, and assign unto said Count Telfener all his rights, titles, and interests which he had or might be entitled to in about 1,000,000 acres, more or less. Now, it was found that Russ' applications covered 1,813 sections, amounting to 1,160,320 acres. The transcript, pages 29 to 31, shows that 1,715 of these sections, amounting to 1,097,600 acres, were all surveyed prior to November 1, and there has been no contention up to this time but that Russ had an assignable interest in this 1,097,600 acres of land.

The authorities cited by the plaintiff in error, namely, White *v.* Martin (66 Texas, 340), Jumbo Cattle Co. *v.* Bacon (79 Texas, 5), and all other authorities hold that when the application for land has been made and the

applicant has caused the lands to be surveyed, he has a right to the land which cannot be defeated even by the State itself, and plaintiff in error has never before contended that such an interest was not assignable, and plaintiff in error (Telfener) has never ventured to claim in any of his assignments of error that these 1,097,600 acres were not assignable.

That Russ's claim to the land which was surveyed prior to November 15 was vested, and that he had an unquestioned right to assign to Telfener, was decided by Justice Gaines, the present eminent Chief Justice of the State of Texas. In the case of The Jumbo Cattle Co. *v.* Bacon, (79 Texas), appellees filed application for the survey December 1, 1882. The surveys were made the 19th and 20th of January, 1883. The law was repealed on January 23, 1883. After the repeal of the act, appellees tendered the 50 cents per acre. The surveyor refused to take the money or to give appellees a patent, because the act had been repealed. The court decided that the money must be received and patent granted. On page 13 the court said:

"By the act of July 14, 1879, the State offered to sell the land to any "responsible person who would make application for it and cause it to be "surveyed. The appellees had accepted the terms by making application "and procuring the surveys before the act was repealed. The contract was "complete and could not be impaired by the subsequent legislation which "repealed the act. The expenses of the surveys, in connection with the "price to be paid to perfect the title, are a sufficient consideration to sup-"port the contract. It cannot be treated as a mere bounty or gratuity "on the part of the State. These principles are recognized in the fol-"lowing authorities: Durkee *v.* Board, etc., 103 U. S. 646; Hardeman *v.* "Railway, 79 Mo. 632; Georgia Penitentiary Companies *v.* Nelms, 71 "Ga. 301; Bransfield *v.* Littleburg, 2 Ga. 143; Montgomery *v.* Casson, "16 Cal. 189; Rector *v.* Philadelphia, 21 How. 300; Blatch. on Const. "Prohibitions, sec. 82; Cool. Const. Lim. 347."

By the Law of Texas, November 1, 1882, Russ's Claim was Assignable.

The only charge that plaintiff in error (Telfener) asked the court to give upon this subject was limited and confined to the 98 sections which were surveyed after November 1, 1882.

The third, which is here the first, assignment of error is as follows:

"The court erred in refusing to give to the jury defendant's special "charge number thirteen, which is as follows:

"Defendant asks the court to charge the jury as follows:

"The court instructs the jury that the 'right, title, and "'interest' of plaintiff, in his application and files on "lands, and which he contracted to sell, was not a "vested right on the first day of November, 1882, in or "to any land surveyed after that date. The acceptance "by the surveyor of plaintiff's application for land in- "vested plaintiff with no right that he could sell; and "for such sections of land surveyed after said November "first, 1882, you will not consider or include in the "measure of damages."

The authorities and arguments which we will present to refute the question presented in this charge will be specially directed to show that these 98 sections were assignable.

It is not necessary for us to contend that Russ's assignment to Telfener of these 98 sections of land passed to Telfener an absolute right which could not be defeated, but we insist that it did convey to him an exclusive right to purchase the land as against every other person, firm, corporation, or sovereignty, except the State of Texas or a pre-emptor.

The cases cited by plaintiff in error do not controvert this position.

On October 4 Russ filed his application with the sur-

veyor for the purchase of these 98 sections of land, and the surveyor adjudged him to be a responsible party, and we insist that this gave him a valuable right which he could assign, and in this we are sustained by the decision of both this court and the supreme court of Texas.

In Telfener *v.* Russ (145 U. S. 532) this court said:

> "It would seem that if a right to purchase land for however short a "period is vested in one, it is a valuable right, and is, in that sense, "property, and in the absence of express prohibition would be there- "fore assignable. Such is apparently the import of language used by "the supreme court of the State in some of its decisions. White *v.* "Martin, 66 Texas, 340; Jumbo Cattle Co. *v.* Bacon, 79 Texas, 5."

On page 32, the brief for plaintiff in error, by Mr. Kent, says:

> "No one applicant has any right over another until the survey is made "and a record thereof filed. Until this is done, one applicant has, under "the statutes, the same right as another. The one for whom the survey "is made and the record filed is the one who acquires the right under "the statutes."

This we by no means admit.

Mr. Peeler, the counsel for Telfener, admits that all but 98 sections of the land had been surveyed prior to November 1st. Mr. Kent's and Mr. Peeler's contention is that even after Russ had applied to have the land surveyed any other responsible citizen could have filed a similar application. We do not admit this, but even if they were right these eminent lawyers will admit that Russ would have a right to the land which would be paramount to the right of every other person in the world who had not filed an application for the survey of or location on the land, and this right would certainly have some value, at least equal to the cost and trouble and labor necessarily involved in making the application for the surveys.

Now, it appears that when applications for surveys were made, the applicant was required to deposit money with

the surveyor to defray the expenses of the survey. The amount so deposited would of course increase the cost of, and therefore the value of, the right which the applicant acquired; but we are not driven to any such position.

It is very clear that, under section 2, after a surveyor had received the application of a party and had adjudged him to be responsible and had filed his application and had received his deposit of money, he would not receive and file the application for any other parties; and even if he did, it would be his duty to survey the land in compliance with the application of the first applicant; and the moment the lands were surveyed the applications of all junior applicants would, under section 8 of the act, become null and void.

The law does not say that after one person has applied to homestead a tract of land all others are excluded, but the law is so thoroughly understood to mean that the first applicant is exclusive of and excludes all others that no one has ever contended otherwise.

The Supreme Court of Texas Decides that Even the 98 Sections were Assignable.

The brief filed by the Hon. Mr. Kent says, p. 11:

"The courts of Texas have not passed upon the question under con-
"sideration, so we may properly notice the construction given somewhat
"similar statutes by other judicial authority."

This eminent lawyer commits a great error in this statement. The courts of Texas have repeatedly decided this question. A similar question was decided in 1856 by the supreme court of Texas in Graham *v.* Henry (17 Texas, 164). This decision has been reaffirmed since that time in Merriweather *v.* Kennard (41 Texas, 273), and is cited in Capp *v.* Henry (75 Texas, 395).

When the act was passed, on the 14th of July, 1879, these

decisions of the supreme court of Texas were in full force, and the framers of that law knew that a law of that character, which did not inhibit the assignment of claims, would, under the decision of the supreme court, make such an assignment permissible. This shows that the intent of the legislature was to make the assignments of such claims permissible. They amended this act on March 11, 1881, and again refused to in any way inhibit the assignments of such claims to land, and, therefore, on November 1, 1882, the law of Texas was that such a claim as Russ possessed was assignable.

I will now give more fully the authorities which sustain this contention.

Graham *v.* Henry (17 Texas, 164) is a case in point.

Section 29 of act of December 14, 1837, so far as relates to this case, is as follows:

"*Be it further enacted*, That * * * every person who has arrived " in this Republic since the Declaration of Independence, and previous " to the first of October, 1837, who is a free white person and the head " of a family, and who actually resides within the Government with his " family, shall be entitled to a conditional grant of twelve hundred and " eighty acres of land, by paying the fees of office and surveying. The " conditions of said grant shall be that both grantee and his or her " family shall remain and reside within this Republic, and do and per- " form all the duties required of other like citizens, for the term of three " years; after which time, he or she shall receive an unconditional deed " for said land; and in no case whatever shall a grant of that description " be made unless it be satisfactorily proven that all the conditions and " provisions of the law have been complied with."

This act was construed by the supreme court of Texas in the case of Graham *v.* Henry (17 Texas, 164). I read from page 164:

" Tried before the Hon. John H. Reagan. Suit commenced September " 11, 1851, by the appellee against appellants, to recover a tract of land. " The plaintiff alleged in his petition that on the 6th day of July, 1838, " in the county of Nacogdoches, there was issued to plaintiff by the " board of land commissioners of the county of Nacogdoches a condi-

" tional certificate for twelve hundred and eighty acres of land; (165)
" and that on the 27th day of September, in same year, one John S.
" Thorn, who was also made a defendant, fraudulently procured from
" him (Henry) an assignment of said certificate, and caused it to be
" located, surveyed, and patented on the land in controversy; that plain-
" tiff was residing on the land, and during his temporary absence from
" home defendants came and took forcible possession, etc. Prayer for
" cancellation of the assignment of the conditional certificate, for the
" delivery of the patent, for the possession of the land," etc.

The court unanimously decided that in the absence of a legislative prohibition the certificate was assignable so soon as it was acquired.

After disposing of certain points immaterial to the case, the court says (pp. 166–7):

" Whether it was assignable, the unconditional certificate not having
" issued, is the material question on which the decision of the question
" depends.

" The certificate was issued under the 29th section of the land law of
" the 14th of December, 1837. Neither that act nor any other in force
" at the time contained any prohibition or restriction upon the power of
" the grantee to sell and dispose of his interest so soon as it was acquired.
" In general, whatever is susceptible of exclusive, individual appropria-
" tion may be the subject of bargain and sale; so that property, consid-
" ered as an exclusive right to things, implies not only a right to use, but
" a right to dispose of them. Whatever exclusive right a man has in
" anything, he has a right to dispose of absolutely, as he pleases, pro-
" vided he makes no disposition of it prohibited by law. It matters not
" what advances he has made towards acquiring the ultimate dominion,
" or absolute and complete proprietorship; the moment he has acquired
" an exclusive interest, though it be but a contingent and executory in-
" terest, he may dispose of it at pleasure, subject only to the condition
" that it is not forbidden by law. Hence, any incipient title or contingent
" interest, which is susceptible of being ripened into a title to lands,
" may be assigned; and such has been the usage in this and other coun-
" tries. It has never been supposed necessary to consummate the title
" before the right could be assigned. The conditional certificate vested
" in the grantee an interest or right which was capable of being per-
" fected into a title. It was a contingent interest, it is true, subject to
" the condition that he and his family should remain and reside within
" the republic and perform all the duties required of other citizens for
" the term of three years, after which he should receive 'an uncondi-

" ' tional deed ' for the land. But, though a contingent, still it was an " exclusive interest, or a right which was assignable in equity, and the " transfer might be enforced, if made for a valuable consideration. Of " course, the interest or right of the assignee would ultimately depend " upon the performance of the precedent conditions by the grantee. He " would take subject to that contingency. But there is nothing in the " nature of the interest, which the conditional certificate conferred, to " prevent its assignability.

" But though not forbidden by any express law, it is said the assign- " ment of these conditional certificates ought not to be upheld, because " contrary to public policy. It is not perceived in what respect it is so, " or what difference it could make to the State, or any one but the " parties themselves, whether the right remained in the grantee until " the conditions of the grant were performed or passed to his assignee. " The law does not undertake to interfere in the private contracts of " men, unless they are such as affect injuriously the rights of others or " are inimical to the interest and well-being of society. And when they " are to be so deemed, it has generally been left to the legislature to de- " clare. The courts would hesitate to go in advance of legislation in " declaring contracts void on the ground of public policy; and where " the legislature has not spoken, they would not interpose, unless upon " a legal necessity arising from precedent and authority."

In Merriweather *v.* Kennard (41 Texas, 273) the same question was decided. The court said, page 275 :

" The first question presented is, Was a conditional certificate, which " issued to emigrants and settlers under the land law of 1837, and prior " to the passage of the act of January, 1839, transferable by the grantee? " In Graham *v.* Henry (17 Texas, 164) this question was directly pre- " sented to the court, and Justice Wheeler, in a very able opinion, con- " curred in by the entire court, says : ' It is the material question.'

" In that case, after a thorough review of the statutes on that subject, " it was decided that neither the law of 1837 nor any in force up to Jan- " uary, 1839, ' contained any prohibition or restriction upon the power " ' of the grantee to sell and dispose of his interest as soon as it was ac- " ' quired.' This decision has been uniformly acquiesced in since 1856."

Both of these decisions are cited as authority in the case of Capp *v.* Terry (75 Texas, 395 and 396).

The case at bar is very much stronger than that of Graham *v.* Henry. In that case the law sought only to induce settlements. The law under which Russ acquired only sought to sell Texas land for money.

The assignment in the Henry case was upheld by the supreme court of Texas; therefore much more should the assignment in this case be sustained.

In Briggs *v.* United States (143 U. S.) that court holds:

"That the sale by the owner of the land of a cotton crop not yet "planted is valid, and that the title to the subject-matter of the contract "not in existence vests potentially from the time of the bargain, and "actually as soon as the subject-matter arises."

To the same effect is Butt *v.* Ellet, 19 Wall. 544.

When any person or sovereign has anything for sale he wants to get the highest price for it, and to limit in any way the rights which are to be conveyed to the purchaser would of course tend to lessen the value to the purchaser, and therefore it would diminish the price he would be willing to give.

The tendency of the decisions of the courts has been to enlarge and liberalize the right of one to assign any valuable interest in property, and it seems hardly necessary to quote authorities on this subject.

Burrill on Assignments, par. 65, note 4, says:

"A purchaser's right to a deed of land agreed to be conveyed is assign-"able," citing:

Brown *v.* Chambers, 12 Ala. 697.
Ensign *v.* Kellogg, 4 Pick. 1.
Rodgers *v.* Dibrell, 6 Lea, 74 Tenn. 69.

"A right to call on a trustee to convey an estate in fee is an equitable "interest or chose in action which may be assigned," citing:

Coverdale *v.* Aldrich, 10 Pick. 391, 395.

"The assignment of a contract to convey an interest in real estate upon "the performance of certain conditions vests an equitable interest "therein in the assignee, which will be protected and made available by "the courts of law," citing:

Dyer *v.* Burnham, 25 Me. 9.

The case at bar was fully and laboriously considered by the circuit court of appeals, and, after reviewing the evidence, they say:

"This contract was a valid and binding contract at the time it was "entered into, unless it was prohibited by law or public policy, which "is not contended."

TIMBER-CULTURE AND DESERT CLAIMS VERY DIFFERENT.

The eminent counsel, Mr. Kent, being unable to find any decisions of any court of last resort to sustain his contention that the claim acquired by Russ was not assignable, says in his brief, p. 11 :

"The desert-land act and timber-culture act are somewhat like those "in question."

And he argues that, because these acts do not expressly inhibit the transfer of claims, there is an analogy between the desert and timber land entry laws and the Texas law.

We insist that his premises are incorrect, and that there is no comparison between the timber and desert law and the Texas law which we are considering.

The reason why the United States does not favor the indiscriminate assignment of claims and contracts does not apply at all to the Texas law under which Russ claims.

There have been millions of homestead entries, and the purpose of the act is to enable the entryman to secure a home, and also for the reason that if assignments were allowed, land entries might be assigned two or three times and it would require an army of clerks to do the work which this would entail upon the Department.

The Government also has out thousands of contracts, and an indiscriminate assignment of these contracts without the knowledge or consent of the Government would cause a confusion which ought to be avoided.

This reason is expressed in the case of Hobbs *v.* McLean (117 U. S. 576), in Mr. Kent's brief, p. 14—

"that the Government might not be harassed by multiplying the "numbers of persons with whom it had to deal, and might always know

"with whom it was dealing until the contract was completed and a settle-
"ment made."

The letters of Secretary Schurz and Secretary Teller, cited by Mr. Kent, do not rise to the dignity of the decision of a court.

These letters are not judicial decisions. They partake more of the character of declarations of a policy of the Department of the Interior.

While it would seem that an assignment of a desert-land claim would be inconsistent with the affidavit filed by an applicant, yet the tendency is so strong to favor assignments that the Land Office issued a circular, March 12, 1877, which authorized the assignment of desert-land claims; but the trouble this gave the Department caused Secretary Schurz to change this ruling and order that the assignment should not be allowed.

Afterwards the policy of the Government was changed, and desert-land claims again became assignable, and during the last few years millions of acres of desert lands have been assigned.

The assignment of desert-land claims has become so general that the Land Department furnishes printed blanks for affidavits to be made by assignees, and the Interior Department also prints the form of this assignee's affidavit, on page 240 of its instructions to receivers and registers of 1892 and on page 261 of a like circular which has just been printed.

This shows that the policy of the Government is to allow the assignment of such claims.

It will be seen that while the timber-culture act does not in express words prohibit assignments, yet the act itself shows that no money whatever is required to be paid for the land, the consideration being that the applicant should

money, and if the authorities cited in Mr. Kent's brief apply at all to this case, I respectfully submit that the solution would be the reverse from that contended for by the eminent counsel for plaintiff in error. The Texas law was enacted in July, 1879. In order to file applications pursuant to this law, it was necessary that a person should have had a knowledge of these lands, ability and willingness to make the necessary inspection of the lands and the records of the land office and the surveyor's officers. Now, such persons visited the counties named in the act, inspected the lands, examined the records, and filed applications.

Some of them were without money, and, having prepared and filed applications, they sought capitalists to procure the necessary means to complete the purchase. It would be probable that railroads and other corporations which were seeking to acquire these lands under laws then existing, and laws which they were seeking to have enacted, would endeavor to throw all obstacles possible in the way of purchases being effected under the act of 1879.

Bills would probably be filed enjoining the assignment of rights possessed by parties who had filed applications.

When those cases reached the Supreme Court, is it not probable that their decision would have been somewhat as follows:

The court would say that the supreme court of Texas had already decided in Graham *v.* Henry (17 Texas, 164), and Merriweather *v.* Kennard (41 Texas, 273), that in the absence of a legislative prohibition such a claim was assignable.—That in White *v.* Martin (66 Texas, 340) the act of 1879 had been construed that *the purpose of the act was to secure purchasers for the public lands.* The head note and opinion both using these words:

"The act itself indicates a desire to raise money by sale."

--That the assignment of such claims aided very materially in carrying out the purpose of the act. That to inhibit their assignment would deprive the State of the aid of large numbers of persons who had the knowledge, ability, and willingness to do the inspecting, and other labor necessary to the preparation and filing of applications for these lands.

The court would then quote the very decisions which are cited by the eminent counsel for the plaintiff in error, Mr. Kent, and would say that

"the intent of the legislature must control,"

and that when the legislature enacted the law in 1879 and amended in 1881, they knew that the supreme court of Texas had decided that such claims were assignable, unless prohibited by the legislature, and the fact that the legislature refused to incorporate a proviso prohibiting assignment under the act of 1879 was conclusive that the legislature intended that applicants might assign their claims.

The 4th, which is here the 2d, assignment of error is as follows (Tr., p. 38):

"The court erred in refusing to give to the jury defendant's special "charge number fourteen, which is as follows:

"Defendant asks the court to charge the jury as follows.

"You are instructed that the law required the field-"notes of the land to be returned to and filed in the "General Land Office within sixty days after the same "was surveyed. The evidence shows that the field-"notes of only twenty-four sections of land were re-"turned to and filed in the General Land Office within "said sixty days; therefore the court charges you that "you can only consider plaintiff's rights in twenty-four "sections of land."

The court rightfully refused the charge, as requested, for three reasons.

"plant, protect, and keep in healthy condition ten acres of timber."

He was required, see page 142, land office circular of 1892,

"to break 10 acres of land the first year; to plant ten acres of timber "the second year, 10 acres the third year, and 20 acres the fourth "year."

But, in addition, they have no bearing upon the question under consideration.

The timber-culture act requires that the applicant shall make an affidavit

"that this filing and entry is made for the cultivation of timber, and for "my own exclusive use and benefit; that I have made the said applica- "tion in good faith, and not for the purpose of speculation, or directly "or indirectly for the use or benefit of any other person or persons "whomsoever; that I intend to hold and cultivate the land, and to fully "comply with the provisions of this said act."

Now, the paramount reason which seemed to govern in the letter of Secretary Teller in the case of Klock *v.* Husted seemed to be the failure of Klock to comply with his contract to

"plant, protect, and keep in a healthy condition 10 acres of timber."

This was the consideration for which the Government parted with the land, and the consideration failed because neither Husted nor his assignee, Hutchinson, protected the trees, and all the trees died.

There is not one word in the act of July 14, 1879, or the amendments thereto, or in the decisions upon that act, which in any way intimated that any of these reasons apply to the Texas act. On the contrary, they show that none of the reasons did apply. The Texas law provided that any responsible party could purchase the lands, 1st,

"by causing the tract or tracts which such person, firm, or corporation "desires to purchase to be surveyed."

And, 2d, by paying or causing

"to be paid into the treasury of the State the purchase money therefor "at the rate of 50 cents per acre."

And to further show that the only purpose of the act was to secure purchasers of the land at 50 cents per acre, section 9 provided that in case the 50 cents was not paid within 60 days after filing the field-notes in the General Land Office

"the land so surveyed may be sold by the Commissioner of the General "Land Office to any other person, firm, or corporation who shall pay "into the treasury the purchase money therefor."

In White *v.* Martin (66 Texas, 340) the supreme court of that State construes this act. It says, page 343:

"The act itself indicates a desire to raise money by sale."

The sole purpose of this act was to get money for the land. It was not to get settlers. It was not personal. There was no forfeiture except for a failure to pay the 50 cents or cause it to be paid.

Section 5 says the applicant may cause the money to be paid just as Russ was contracting to cause it to be paid by Telfener.

The learned counsel for plaintiff in error, in his effort to show that the claim which Russ possessed was not assignable, asserts in his brief, page 7, that—

"statutory grants are to be construed strictly in favor of the public."

On page 8, he says this—

"serves to defeat any purpose concealed by the skilful use of terms to "accomplish something not apparent on the face of the act."

The act of 1879 was not a grant.

That "the expense of the surveys and the price to be paid are a sufficient consideration" and that it is "not a bounty" is decided in Jumbo Cattle Co. *v.* Bacon (79 Texas, p. 13.) The law was enacted for the purpose of enabling the State to sell these lands for

1st. When Count Telfener failed to comply with his contract by paying 90 per cent. of the purchase money on November 15, 1882, the rights and liabilities of the parties became fixed. Nothing more was required of plaintiff. It was not required of him to take any other steps in order to maintain his rights. Under the contract Exhibit N to the petition, he was, for a consideration therein named, to assist in perfecting the title, but this was only in the event that Telfener complied with his contract to pay the 90 per cent. on the 15th of November. His failure to do so relieved the plaintiff of any obligation to proceed further, and plaintiff's right of action then accrued.

This is the position taken in the opinion rendered by the circuit court of appeals.

In referring to this assignment of error, the court says, (Tr., p. 48):

> "In the view that we take of the case it is wholly immaterial whether "the surveys made under the application of the plaintiff and returned "to the General Land Office were made and returned within sixty days "after the date of the surveys or were not returned at all."

2d. The applications were made on October 4 and 5, and the records show that the surveys began very soon after, and on October 13, 1882, some of them were certified, and the record shows that the surveys were continued until the 9th day of November, 1882, when they were concluded. The field-notes were filed by the surveyor in the General Land Office on the 8th day of January, 1883, within the sixty days, required by law, after the completion of the survey.

Now, the application of plaintiff Russ was to purchase a certain body of land, which the surveyor was to survey and divide up into sections. The law did not contemplate that the surveyor should return and file his field-notes in

the General Land Office of the survey of each separate section as the work was done. This would have involved 1,813 separate files of field-notes under plaintiff's application to purchase a body of land which, when surveyed, turned out to be 1,813 sections.

I submit that the word "same" in Sec. 3 refers to the "lands designated in the application," therefore, substituting these words for the word "same," the section will read:

> "It shall be the duty of the surveyor to whom application is made by "responsible parties to survey the lands designated in said application "within three months from the date thereof, and within sixty days after "said survey to certify to, record, and map the field-notes of said sur-"vey; and he shall also, within the said 60 days, return to and file the "*survey of the lands designated in said application* in the General Land "Office as required by law in other cases."

The court judicially knows that the distance of El Paso county from the General Land Office was so great, and the facilities for travel so little, that it would have been impossible for the surveyor of that county to have filed the field-notes of each section separately.

A third conclusive reason why this charge should not have been given was that the law did not require the applicant to make the filing, but the law required this to be done by the surveyor himself. This part of the law was only directory. And, again, the law did not inflict the penalty of forfeiture for failure to file the notes within 60 days. And, again, the record shows that 25 sections which were surveyed on November 3, 1882 (Tr., p. 30), were filed on January 8, 1883, and the officers of the Land Office adjudicated that they were filed in time, and granted patents therefor.

In Bacon *v.* State (2 Texas Civ. App. 692) a similar case was decided, and it was held that there was no forfeiture for any other reason than as stipulated in the law.

The 5th, which is here the 3d, assignment of error was as follows (Tr., p. 38):

"The court erred in refusing to give to the jury the defendant's special "charge number 16, which is as follows:

"Defendant asks the court to charge the jury as follows:

"If the jury find from the evidence that any of the "sections of land described in plaintiff's petition were "not actually surveyed on the ground, then and in "such case they are instructed that such surveys are "void and for such sections plaintiff cannot recover; "and if the jury should find that none of said sections "were actually surveyed on the ground, then they are "instructed to return a verdict for the defendant."

THIS CHARGE PROPERLY REFUSED.

The record shows that this charge was properly refused upon two grounds, and upon a 3d ground the record shows that this court cannot decide whether the charge was properly or improperly refused.

1st. In consequence of Telfener's failure to pay for the land, the 2d contract (Exhibit N) never became operative, and Russ was under no obligation to have the land surveyed, and, to use the language of the opinion of the circuit court of appeals, (Tr., p. 48):

"It is wholly immaterial whether the surveys made under the said "application were actually made on the ground or were office surveys."

2d. The charge was abstract. There is no evidence in the record that any of the sections were not actually surveyed on the ground. A charge such as is asked in special charge No. 16 was properly refused for that reason.

It is true that F. M. Maddox testified that he was a surveyor, but he had nothing to do with the survey of the lands in controversy.

The record does not say that he ever surveyed in the part of Texas where the land under consideration is situated.

Tr., p. 33, he testifies as to what one surveyor could or could not do in a day, and what he had done in surveying, but he does not say whether this surveying was done recently or forty or fifty years before he testified.

In recent years methods of surveying and surveying instruments have been improved upon like methods and instruments in other vocations.

By triangulation measurements are verified and points fixed accurately with great rapidity.

At one time it took 3 months to cross the continent. Now it takes 5 days.

On cross-examination Maddox modified his testimony. The only other testimony that appeared in the record is the evidence of S. W. S. Duncan, who assisted in making the survey, and who testified with regard to the survey of the 1,813 sections of land referred to in this suit. He said :

"I made a contract for plaintiff with the county surveyor of El Paso " county for making the surveys of said sections. There was employed " by me in the survey and making the field-notes, between 20 and 30 " people altogether. I employed the county surveyor, and all of his " assistants and myself helped in making the survey and superintending " the matter from making the application to finally turning the field- " notes over to plaintiff to file in the General Land Office. I do know " that the survey was made and the field-notes returned to the General " Land Office, because I superintended the survey and helped to take " the field-notes to the office, and saw plaintiff pay the filing fee of ($1) " one dollar per section."

Here is positive, undisputed evidence that the surveyor of the county and all of his assistants were employed in making the surveys. The different bodies of land were in blocks very convenient to survey rapidly with the improved methods. The evidence shows that the surveyor had a large number of surveying parties, and even Mr. Maddox testifies, page 33,—

" that the more surveyors you have, the more work you can do ; that one " surveyor could sorter supervise the other surveyors, but that he could

" not be with each surveying party, but could direct their general move
" ments; that the amount of work that could be done would increase ac-
" cording to the number of surveyors employed at a specified time, and
" the number of sections one surveyor could survey depends upon the
" number of men he has with him; and that the additional number of
" men would facilitate the surveyors in crossing streams, making set-offs,
" etc."

On redirect examination the witness testified with regard to surveying by—

" making only two corners to each section."

Upon recross-examination witness said—

" that would be actual surveying on the ground; that is, what is termed
" actual surveying on the ground is work done on the ground by which
" you could identify a survey. This work would be that kind."

The substance of Maddox's testimony appears to be that all this land could not, in his opinion, have been surveyed on the ground in the time stated by fixing four corners and running four miles for each section; but he admitted on cross-examination that such work was not necessary to constitute a survey on the ground.

Mr. Kent says in his brief, page 33:

" It is not pretended that previous surveys of any of the land in
" question were made."

In reply, I say that the converse of this is not pretended either. The reports of the supreme court of Texas show, however, that for ten years previous to this time various railroads and projected railroads had caused millions of acres of the Texas lands to be surveyed for the purpose of acquiring them.

I cite one of the numerous decisions—79th Texas, pages 8 to 12. These decisions are part of the history of Texas and tend to explain how it was that 30 men could promptly survey these lands as shown by the uncontradicted and unimpeached testimony of Duncan.

A re-survey of lands can be done with great rapidity.

Again, it is very possible that the dates of the surveys which appear on page 30 may be the days in which the surveys of the various blocks were completed; preliminary work may have been done before those dates.

Mr. Maddox's evidence cannot be considered as more than an expression of the opinion of a man who had never been in the section of the country where the surveys of the Russ lands took place and who did not know how such surveys were conducted.

Had Mr. Maddox read the decision of the supreme court of Texas and there seen the evidence of the numerous previous surveys of these public lands, he no doubt would have expressed a different opinion.

He would have admitted that these previous surveys would have established corners and measurements of lines, so that the 30 men employed by Russ and who surveyed the land on the ground, could have very promptly verified the points and measurements, and this would have been consistent with the unimpeached testimony of Mr. Duncan.

And Mr. Duncan is sustained by the records of a land office of a sovereign State, the verity of which can only be impeached by positive, unquestioned evidence.

Pollard *v.* Dwight (4 Cranch, 421) was similar to this case. Lessee *v.* Bradshaw (4 Wash. C. C. 171) held, where a survey had been returned and accepted, it is *prima facie* legally made, and those who attack must prove.

16 Wall. 335, legal presumption is that surveyors have done their duty.

Article 3908, statutes of Texas, says that field-notes of every survey must show the name of the chain bearers. These chain bearers were the best evidence after the surveyor's death.

The only purpose of the survey is shown by the Texas decisions to have been to identify and locate the land and to describe the locality and boundaries in the field-notes, in order that they might be inserted in the patent so that the lands might be identified. This is recited in 30th Texas, 257, which is printed on page 23 of Mr. Kent's brief.

Now, if the public surveyor complied with these requisites, the survey was a legal one, according to the decisions of the supreme court of Texas. That he did so is shown by the fact that the surveys of all of the land involved in this suit were received and accepted at the Land Office.

The case Bacon *v.* The State (2 Texas Civ. App. 692), cited by plaintiff in error, decides that in surveying large blocks of land under the act of July 14, 1879, it was only necessary to run the outside boundary lines of the block and establish its corners, leaving the interior lines between the sections without running. The 15th finding of fact by the court, page 695, as far as material, was as follows:

"Blocks 97 and 27 were actually surveyed on the ground by Elgin in "the manner in which it has been customary by surveyors in Texas to "survey large bodies of land; that is, by running the outside boundary "lines of the blocks, or a part of them, putting up permanent landmarks, "and leaving the interior lines without running. These blocks, in "writing up field-notes, were divided into 640-acre surveys, and the "interior surveys were made without actually running the lines; and "Elgin did not run all the lines of any section in blocks 27 and 97 unless, "as he says, it was done by accident."

The court decided that, under the act of 1879 and the amendments thereto, this was a legal survey. The court said:

"This surveying was done by dividing large blocks of land into sec-"tions containing 640 acres each, as will be seen by reference to our "conclusions of fact, and was done upon the ground in such way as "might be regarded as work in the field."

It was shown that the survey for Bacon was simply a copy of field-notes which were on file in the surveyor's office. This is not the case with regard to the surveys made for Russ.

3d. It is impossible for the court to know what evidence was before the circuit court as to the manner of conducting the survey.

The bill of exception does not pretend to set out all the evidence on that point. The surveyor, A. M. Randolph, was dead, but his deputies and the chain bearers and others who assisted could have been called by plaintiff in error, but the record does not give the evidence of any witness who was employed on the survey except S. W. S. Duncan. Now, it requires no argument in this court that they cannot consider the charge upon a point of evidence unless the record affirmatively shows that it contains all the evidence upon that point.

This certainly disposes of the 3d assignment of error.

On page 21 of Mr. Kent's brief he cites the case of Chanter *v.* Leese.

This has no application to the case we are considering.

Our contract was to convey 1,000,000 acres of land, more or less, and the transcript shows that more than 1,000,000 acres was surveyed prior to November 1.

If the case of Chanter *v.* Leese had been a sale of all the right, title, and interest of the vendor in six patents, more or less, for so much a patent, the decision of the court of exchequer chamber would have been very different.

I do not think the extract which appears in the brief of the learned counsel for plaintiff in error at all expresses the principle which that case has decided. It seems that the six patents were so closely connected with each other that the use of them jointly was necessary to derive benefit from them, and the failure of one was there-

fore the failure of all. I read from the report itself, 5 Meeson & Welsby, p. 701:

"the annuity to be paid is neither apportioned by the contract, nor capa-
"ble of being apportioned by a jury. And this is apparent by reading
"the agreement itself as stated in the declaration, in which the six patents
"are so closely connected with each other, that the benefit expected by
"the defendants under the agreement is obviously to result from the use
"of all of them jointly, in such manner as the defendants may think fit,
"and the inability to use any one who would manifestly endanger a great
"part, if not the whole, of that benefit."

It is clear that this decision has no bearing upon the case now being considered, but beyond all this the plaintiff in error did not take any exception in the trial to bring this point before the court, nor did he ask for any charge upon this point. We therefore contend that the court cannot give this question any consideration.

Plaintiff in error's counsel, Mr. Kent, says (page 33):

"Russ had no exclusive right—he had no vested right. At the time
"of making the contract he had simply filed his application, and this
"gave him no right whatever."

On page 35 he says:

"The land had not been surveyed when the contract was made, there-
"fore he had no interest to sell."

The record conclusively shows that this statement is not correct, and the circuit court of appeals, in its opinion (Tr., p. 48), says:

"It (the evidence) shows also that the surveys of said land for which
"said Russ had made application were made at and prior to the time of
"the execution of the contract sued on saving and accepting 98 sections
"of 640 acres each, surveys of which were made between November 1st
"and November 9th, 1882."

The court also says:

"The instrument executed between the plaintiff and the defendant
"November 1, 1882, was an executory contract by which the plaintiff,
"for and in consideration of a sum of money promised to be paid by
"the defendant, agreed, on the 15th day of November, 1882, to transfer
"and assign to defendant all his right, title, and interest in and to the

"land in question acquired by virtue of plaintiff's application. This "contract was a valid and binding contract at the time it was entered "into unless it was prohibited by law or public policy, which is not con- "tended."

On page 34 Mr. Kent says:

"First and foremost the land was never worth anything, not even a "statutory price."

I assert there is no such evidence in the record.

If the gentleman will look into the transcript of record of this case, October term, 1890, No. 746, and October term, 1891, No. 329, he will find that in October, 1882, these lands were very valuable and that similar lands were selling at $1.00 per acre, and that Russ held his at that price.

Pages 57 and 59 we see that on October 24 Telfener's agent telegraphs him that—

"The General (meaning Russ) holds firm one dollar on his million "acre if he is to deliver patents."

Telfener's expert, Scott, reports the Kneeland lands as inferior, and yet this record (pages 37 and 39) shows that on October 7 and October 12, 1882, Telfener desires to purchase them at 75 cents.

In November there was a change and they fell very much in value.

On page 90 is a despatch from Telfener to his agent, Wescott, dated London, November 28, 1882, suggesting to him—

"to alter the Russ contract and get better conditions because here the "Texas fever seems finished. The lands are now offered directly by the "vendors at 70 cents per acre, but capitalists refuse to buy them as they "believe the price is too dear."

This explains why he did not comply with his contract.

The record shows that there was a great demand for these lands in October, 1882, and when this condition existed, Telfener's great anxiety to buy is shown by his urgent letters of September and October, pages 36 to 43.

On October 13, 1882, page 41, Telfener dispatches his agent:

"You will learn from Mr. Scott what extraordinary movement there is "in these Texas lands and cattle among many Lords and English capi- "talists. * * * What is wanted, I repeat it for the millionth time, is "3,000,000 acres of land. Work night and day, for we must succeed at "whatever cost. They must not know that my expert is Scott."

Mr. Kent also makes this assertion in his brief, page 27:

"The only interest which the defendant in error can in any event "claim to have possessed in any of the lands, by virtue of the statutes, "is the right acquired by filing the field-notes. This interest, however, "was limited to 15,360 acres."

This statement is not sustained by the record, and if it were true, there is no exception or assignment by which the court can consider it.

The brief, then, page 38, says:

"The condition of the contract was never fulfilled, hence the agree- "ment to purchase failed."

In reply I will say that the only reason why the contract was never fulfilled was because the plaintiff in error, Count Telfener, refused to comply with his part of the contract.

I cannot close this brief better than by reciting the very able opinion of the circuit court of appeals upon the points plaintiff in error has assigned as error in this court.

1st. As to the 3d assignment of error, namely, the right of Russ to assign and sell the 98 sections.

"The evidence relating to this matter shows that the "plaintiff had made application in two instruments of "writing for the survey of 1,813 sections of land described "in his petition, which was addressed to, and the appli- "cations filed by, the county surveyor of El Paso county "on October 4th and 5th, 1882, respectively. It shows "also that the surveys of said land for which said Russ had "made application were made at and prior to the time of "the execution of the contract sued on, saving and except- "ing 98 sections of 640 acres each, surveys of which were

" made between November 1st and November 9th, 1882. " These surveys were filed in the General Land Office on " the 8th day of January, 1883. The instrument exe- " cuted between the plaintiff and the defendant November " 1, 1882, was an executory contract by which the plaintiff, " for and in consideration of a sum of money promised to " be paid by the defendant, agreed, on the 15th day of " November, 1882, to transfer and assign to defendant " all his right, title, and interest in and to the land in " question acquired by virtue of plaintiff's application. " *This contract was a valid and binding contract at the* " *time it was entered into, unless it was prohibited by law* " *or public policy, which is not contended.*

" Under this state of the law and of the evidence, the " instruction asked for did not present the law of the case, " and if technically correct as a general proposition was " calculated to mislead, and was therefore properly re- " fused. The actual charge of the court given in this re- " gard is as follows:

" ' You are further instructed that the right to purchase " ' the lands mentioned, which right the plaintiff acquired " ' by virtue of his applications, as set forth in the con- " ' tract and shown by the evidence, was a valuable right, " ' and one which could be lawfully assigned;' " and it seems to have correctly presented the law of the " case."

2d. The opinion of the circuit court of appeals discussed the contention of plaintiff in error with regard to the return of the field-notes to the General Land Office together with the contention of plaintiff in error that the surveys were void.

These two questions were raised by the 4th and 5th assignments of error, which appear here as the 2d and 3d assignments of error.

The court said:

" This assignment, relating to the filing in the General " Land Office of the surveys made under the application " of the plaintiff in the court below, may be disposed of

" with the fifth assignment of error, which relates to a " question as to whether the surveys made under the " plaintiff's application, and returned to and filed in the " General Land Office, were actual surveys on the ground, " or were 'chimney corner' or office surveys.

" In the view that we take of the case, it is *wholly im-* " *material whether the surveys made under the application* " *of the plaintiff* and returned to the General Land Office, " were made and *returned within sixty days* after the date " of the survey, or were returned at all; and, also, *whether* " *the surveys made* under the said application *were actually* " *made on the ground or were office surveys.*

" With regard to the return of the surveys to the Gen- " eral Land Office with the field-notes within sixty days " after the date of the survey, a reference to the law will " show that the *duty of making such return devolved not* " *upon the applicant*, but upon the surveyor, and that the " failure to make such return within the time on the part " of the surveyor *is not a reason for forfeiture* under the " terms of the act.

" The ninth section of the act is the only section of the " same which provides for the forfeiture of the rights " secured by the application, and that provision is, that " should any applicant for the purchase of public land " fail, refuse, or neglect to pay for the same at the rate of " fifty cents per acre within the time prescribed in section " 5 of the act, he shall forfeit all rights thereto, and he " shall not be allowed thereafter to purchase the same. " But be this as it may, the contract sued on is an agree- " ment to transfer from Russ to Telfener all and singular " the rights, title, and interest that the said Russ now has " or may be entitled to in and to said lands, by reason of " the application theretofore made by him to purchase the " same. There was no agreement whatever that any actual " surveys had been made under such application, or that " if such actual surveys had been made, he (Russ) would " cause them to be returned and filed in the General Land " Office at any time or in any manner whatever. The con- " tract made the same day between the same parties, pro- " vided that Russ, at his own proper cost and expense,

" should make all the surveys, field-notes, and maps of the " said lands, and file them in the office of the surveyor of " El Paso county, and in the general land office of the city " of Austin, Texas, in the manner and within the time re- " quired by the provisions of said law, but this only in " case the sale and transfer should be made under the con- " tract first mentioned at the time agreed on, to wit, No- " vember 15, 1882.

" As *it is conceded that Telfener made default* under " the first-mentioned contract on the 15th of November, " 1882, and that the sale and transfer under said contract " was never carried out, the second-mentioned contract " became wholly inoperative and irrelevant; and the " rights of the plaintiff became fixed, definite, and certain " on the 15th of November, 1882, at the time defendant " Telfener made default. Under these circumstances, *we* " *fail to perceive any obligation resting upon Russ to either* " *complete the surveys or file the same in the General Land* " *Office.* Whatever was done by Russ after the 15th of " November to perfect the surveys and file the same was " done at his own cost and at his own risk, and could in " nowise affect the plaintiff in error, Telfener, because the " rule for damages in the case was, as declared by the Su- " preme Court in Telfener *v.* Russ, *supra*, as follows:

" On the 15th of November he (Russ) possessed all " the right to the land which he ever possessed; and, as- " suming that the defendant then failed to make the pay- " ment which he had agreed to make, all the damages " suffered by the plaintiff was the difference between the " value of the right, as stipulated to be paid, and the " amount which could then have been obtained on its " sale."

We most respectfully submit that as the assignments appear in the record the trial court committed no error, and we most earnestly and respectfully ask that the judgment be affirmed.

JOSIAH PATTERSON AND
JOSEPH WHEELER,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

COUNT JOSEPH TELFENER,
PLAINTIFF IN ERROR,

v.

GEORGE W. RUSS,
DEFENDANT IN ERROR.

No. 462.

JOSEPH WHEELER,
CLARENCE H. MILLER,
Counsel for Geo. W. Russ.

Questions asked by the Justices on the Oral Argument, and Answers thereto.

Question by MR. JUSTICE BROWN:

Is not the judgment a very large one? What did Russ lose that he should recover such an amount?

This question involves the measure of damages, and that was decided on the former appeal of this case (Telfener *v.* Russ, 145 U. S. 532). If the subject-matter of the contract was a valuable assignable right, and Russ performed his part of the contract, or was ready, able, and willing to do so, but was excused from so doing by Telfener's default, and the correct measure of damages, as laid down by this

court, was given, then the verdict should stand. But the merits of this case are against Telfener. He deliberately entered into the contract knowing what he was getting. At that time the lands were worth 80 cents an acre—the price, including cost of survey, he was to pay. If Russ had not sold to Telfener he (Russ) might have sold to some one else who would have acted honestly and paid him. Russ lost this chance of selling to others from November 1st to 15th, *i. e.*, from date of the contract till Telfener defaulted. When Telfener made default fifteen days thereafter, the price of the land had fallen. Did Russ not thereby lose something of value—as valuable as what he claims Telfener owes him? The loss of a chance to sell for a few days may mean the loss of a fortune. It is a common occurrence in cotton and stock transactions and in real estate values especially that depend on boom prices. These contracts, however, are not delared by the courts to be without consideration when the prices fall and the buyer loses money. In all business contracts each party takes his chance of making or losing. If the lands had gone up in value to $1.50 an acre and Russ had refused to convey, Telfener would demand his profits. If a miner knows of a valuable mine and locates on it, can he not contract to sell it for a large sum and enforce the payment? Yet, what did he lose? He might have found the mine by accident and spent little to locate it.

The judgment is large; but if parties deal in large transactions must they not expect, if they exercise bad judgment, to lose heavily? If they succeed at one stroke they make fortunes. Can they, then, complain if by one bad step they lose fortunes? Assuredly the same legal principles apply to this case as if the transaction had been about a dozen sections instead of over a million acres.

Our client acted honestly, in good faith. So found the

jury, the trial judge, and circuit court of appeals. We only ask that this court sanction the just principle that Telfener be forced to do likewise.

Question by MR. JUSTICE SHIRAS:

Has the supreme court of Texas construed sec. 6 of the act; that is, as to the number of tracts one person could apply for?

Section 6 of original act was amended in 1881, and Russ, in October, 1882, made his application to purchase and survey the land. The amended section, under which Russ made his application, reads as follows:

"SEC. 6. These lands shall be sold in tracts of 640 acres each, unless "precluded by previous surveys, in which event the purchaser must in- "clude all the vacancy, and no tract shall have a greater frontage on any "navigable stream or permanent water than one-half the square of such "survey, excepting where surrounded by other surveys."

Section 2 reads:

"That any person, firm, or corporation desiring to purchase *any* of the "unappropriated lands . . . may do so by causing the tract or *tracts* " . . . to be surveyed," &c.

In section 5 it is said:

"Said commissioner shall issue to said person, firm, or corporation a "patent for the tract or *tracts* of land so surveyed and paid for."

The use of the language "tract or *tracts*" shows that it was contemplated that a person, firm, or corporation should have the right to apply for and purchase more than one tract of 640 acres.

This construction is upheld in Jumbo Cattle Co. *v.* Bacon (79 Texas, 5).

In that case Bacon and Graves made application under the act July 14, 1879, and amendment of 1881 of section 6 for 27 tracts of 640 acres each; that is, 17,280 acres. The application was for the land in one body to be surveyed in 640-acre tracts. The lands were surveyed under

this application before the repeal of the act. In regard to the construction of section 6 as amended, the court said:

"In our opinion this was not intended to prescribe or affect the form "of the application. It simply prescribed the amount to be purchased "in one survey. Its main object was probably to cause the lands which "should be sold to be surveyed into sections with marked boundaries "for the convenience of holders under conveyances from the purchasers. "It was hardly practicable to designate the boundary of each section "desired to be purchased without a survey, and the act contemplated a "survey after the application. Two surveys were certainly not required."

The court held that the one application for the 27 tracts, aggregating 17,280 acres, was valid under the act in question.

This conclusively shows that the number of sections that one person, firm, or corporation could apply for and purchase was not limited by section 6.

This construction is further corroborated by the statement in White *v.* Martin (66 Texas, p. 343), where the court says:

"The act itself indicates a desire to raise money by sale."

Question by Mr. JUSTICE FIELD:

Is it not true that no right to complete the purchase from the State vested till the purchase money was paid?

This question is directly answered by the decisions of the supreme court of Texas.

In White *v.* Martin (66 Tex. 340) the application for purchase was made November 23, 1882, and the survey was made December 21, 1882. The act in question was repealed January 22, 1883, before anything was done but filing the application and making the survey. The field-notes and maps were not filed in General Land Office till January 30, 1883, more than a week after the repeal of the law. The question was raised as to whether the applicant acquired a vested right before the repeal. The court said (66 Texas, 344):

"How may the applicant become a purchaser? The statute answers "the question. He 'may do so by causing the tract or tracts which "'such person, firm, or corporation desires to purchase to be surveyed.' "When this is done as the act contemplates, then, and not before, the "State contracts, upon the purchaser's complying with the other require- "ments of the act, that it will convey to him the land surveyed. When "this point was reached, there existed an executory contract which gave "the purchaser a vested right, upon complying with his part of the con- "tract, to have the land purchased, of which subsequent legislation can- "not deprive them.

"On the faith of the State's promise, the applicant, in good faith, ex- "pends money to have the lands surveyed or incurs obligation to pay."

. . .

"The survey was made for the appellees within the time prescribed by "law and thus was vested his right." . . .

"The ninth section declares that if the applicant fails, refuses, or "neglects to pay for the land within the time prescribed, 'he shall for- "'feit all right thereto.'

"The right cannot be forfeited before it exists, hence we have the "clear declaration in the statute that it is not the payment of the pur- "chase money which vests the right to have the land, but that the right "vests in the person who has had the survey made, which, however, may "be lost by failure to comply with the other terms required of him."

Comment could not make this language plainer. The survey vests the right and not the payment of the money.

The same question arose and was decided in Jumbo Cattle Co. *v.* Bacon (79 Texas, 5). There the application was made December 1, 1882, and surveys made January 19 and 20, 1883, two days before the law was repealed. It is not stated when the other steps toward securing patent were taken except that they were taken within sixty days after the survey. The court said (79 Texas, 12):

"The question then is as to the effect of the act of January 22, 1883, "which repealed the acts under which appellees made application to "purchase the lands. The application had been made and the land had "been surveyed when the repealing act took effect. Had the appellees "then acquired a vested right which the legislature could not take "away? . . . The ruling in White *v.* Martin (66 Texas, 340) is "decisive of the question. . . . In the case cited it was held there "was a vested right which was not destroyed by the repealing act."

In Campbell *v.* Wade (132 U. S. 34) the question did not arise as no survey was made before the repeal. Merely an application was made before repeal, and hence that case is not authority on the point under discussion. It seems, however, that Mr. Justice Field, who rendered the opinion, recognized the correctness of our contention. He said :

" But for this declaration of the act, we might doubt whether a right " to purchase could be considered as conferred by the mere survey so as " to bind the State."

This clearly means that the act declares that a right to purchase is conferred by the mere survey so as to bind the State.

This question was not decided by this court on the former appeal of this case, but its determination was expressly postponed. Hence the remarks of Mr. Justice Field in the opinion as to when the right to purchase vested are *dicta*. He intimates that the right to purchase did not vest till the map and field-notes were filed in the General Land Office, which is directly contrary to the ruling in the Texas cases above cited and quoted.

The contract made Nov. 1st bound Telfener to pay Russ 25 cents per acre on Nov. 15th, and upon said payment Russ bound himself to assign

" unto the said Count Telfener all and singular the rights, titles, and in- " terests that the said Russ now has or may be entitled to in and to said " lands, etc."

On Nov. 15th, the date Russ agreed to make the transfer, all the lands *had been surveyed*, and they *all vested* in *Russ*, and the record shows that Russ was able and ready to transfer and assign as per his contract.

Question by Mr. Justice Field :

Did Russ acquire any right of any kind by his application?

This question is answered in Hobert *v.* Wilson, 31st Southwestern Reporter, 711. In that case the question was whether the first applicant acquired a right of preference over subsequent applicants. The court said:

"The law awards the land to the first applicant who is able to make "affidavit to actual settlement, and comply with the other requirements "of the statute; and the fact that some other person may have preceded "him in settling thereon, but not in making application to purchase, will "not deprive him of the right thus guaranteed."

In the Yosemite Valley case (15th Wallace, 77) and Frisbie *v.* Whitney (9 Wallace, 196) this court decided that a pre-emptor acquires by settlement with a view of pre-emption a privilege in case the lands are offered for sale that he may purchase in preference to others, although he acquires thereby no vested right against the United States. Clearly, then, these cases are applicable to the rights of an applicant under the law in question, if the analogy between the inchoate right of a settler and the inchoate right of an applicant to first have the survey made holds good. We think the analogy is complete. The end in view in the one case is to encourage settlement, and in the other to encourage sales of land. It would be unjust to the settler not to give him preference, and so it would be to the applicant. The settler expends his time and money in settling on the land; the applicant expends his time in seeking out the lands and his money in paying filing fees. If it be admitted that the applicant expends less time, would that make a difference? One settler expends less time and money than another, but that makes no difference. Russ may have spent a great deal of time and money in locating these lands, ascertaining their metes and bounds, courses and distance, and sending out to El Paso county to have the files made.

But the act itself is clear on this point, as appears from a comparison of sections 1 and 8.

Section 1 of the act provides that any party shall have the same right of pre-empting these lands as he may have had prior to the passage of the act.

Section 8 declares that after the survey no person should file or locate upon the land so surveyed. Hence it follows that a responsible party should by filing his application have the exclusive right, except as against pre-emptors, for the period of three months to have the land surveyed.

Any other construction would have defeated the purpose of the act—that is, the sale of the land—for, unless an applicant had some protection against subsequent applicants, he would not undergo the trouble and expense necessary in making the application. He would have had no security whatever that his time and labor would not have been lost.

Question by MR. JUSTICE FIELD:

Was the application for a survey or for purchase?

It was both. In the petition it is alleged that Russ made application, under the regulations of the land commissioner, to the surveyor for the survey and purchase of the land (Rec. p. 2). Section 7 of the act imposes the duty upon the land commissioner to make regulations on the subject. These regulations are not in the record nor is a copy of the application.

The application to the surveyor is the only application a would-be purchaser makes to purchase. It is the first step toward acquiring title, and why should it not be considered as an application to purchase as well as survey? In White *v.* Martin (66 Texas, 343) the court said:

"The application evidences a desire to purchase, that is, to acquire "the right to have the land applied for by further complying with all "terms of the act."

The terms to purchase were fully known on both sides and needed no preliminary negotiation to settle them. The land was identified by metes and bounds, courses and distance in the application. The next step was a survey which conferred upon the applicant a vested right. If, then, the application was not for purchase, the purchase would be made without application to purchase, because, after the survey, it would then be rather late to speak of the subsequent steps being a mere application to purchase.

Section 9 of the act reads, "Should any applicant for the purchase of public land fail," etc., and by this language upholds our contention. We do not think, however, that it is material what the application is called. The answer to this question, whatever it is, cannot affect the real principles upon which Russ is entitled to recover.

Question of Mr. JUSTICE SHIRAS:

Does the reference in section 3 to "responsible parties" have any bearing upon the right of assignment?

Section 3 reads:

> "It shall be the duty of the surveyor to whom application is made by "responsible parties to survey the lands designated in said application, "etc."

If the purpose here was to prevent an assignment to irresponsible parties so as to protect the State against the failure to promptly pay the purchase money, the language would have been more explicit and clear in expressing that idea; because, after the survey, the surveyor no longer has anything to do in the matter, and an irresponsible party might hold the lands for 120 days without forfeiting the rights secured by the survey and without paying the money. The State, if the purpose was to pre-

vent assignments, would have made that purpose plain, especially as the general rule of law was and is to sustain assignments where there is no express prohibition against them. This is the doctrine announced in Graham *v.* Henry (17 Tex. 164), approved by the supreme court of Texas in Davis *v.* Brogan (32 Southwestern Reporter, 874). It is further announced in strong language in Lamb *v.* Davenport (18 Wallace, 307), the head-note of which reads:

"Unless forbidden by some positive law, contracts made by actual "settlers on the public lands concerning their possessory rights, and "concerning the title to be acquired in future from the United States, "are valid as between the parties to the contract, though there be at the "time no act of Congress by which the title may be acquired, and "though the Government is under no obligation to either of the parties "in regard to the title."

See further the authorities in our supplemental argument.

In view of these authorities, and the fact that it was to the interest of the State not to restrain the traffic in these lands, but in every way to encourage it so as to raise money by the sales, we submit that the expression in section 3 does not evidence any intention by the legislature to prohibit assignment of rights acquired under the law in question.

The applicant's obligations and responsibilities to the State and to its officials would not be relieved or lessened in the slightest degree by his assigning the claim or right which he acquired by filing the application.

The State's right to hold him responsible would remain unimpaired, and he would be liable to the surveyor for the cost of the survey.

White *v.* Martin, 66 Texas, 343, says:

"The act itself indicates a desire to raise money by sale."

This object would be more effectually accomplished by the claims being assigned. See ante, 29–31.

Question by MR. JUSTICE FIELD:

Was it not a physical impossibility that the land was surveyed on the ground in the time stated?

If Russ acquired by his application alone a valuable right that was assignable, and if the default of Telfener to pay the money November 15, 1882, excused Russ from further performance on his part (Anvil Mining Co. *v.* Humble, 153 U. S. 551), then the judgment should be affirmed without considering this question. We are confident that the authorities cited in our briefs sustain this position, and that this court will not get to the question here asked.

Again, the point whether the surveys were actually made was an afterthought with Telfener, not even raised when the case was formerly before this court, and which had no effect whatever in causing him to fail to carry out his contract. He could have obtained his patents to the land whether the surveys were actually made or not, because Russ actually obtained patents to 25 of the sections.

It is alleged in the petition that no adverse claim has ever been asserted to the lands in question (Rec., p. 6), and hence the only person who should have raised a question as to the validity of the surveys was the State. As the State was not disposed to raise that issue, and it would not have prevented issuance of the patents, we submit that it has no place in this controversy.

If the court, however, insists upon going into this question, the direct evidence is that the surveys were made on the ground; the certificate of the surveyor so states, and the expert evidence relied upon to overcome this does not, when carefully considered, show that it was even improbable that the surveys were actually made.

The greatest number of sections surveyed in one day was 208. These were surveyed October 27, in two blocks of 72 and 136 sections, respectively. (Rec., p. 30.) Maddox testified that putting only two corners to each section would be surveying on the ground—that is, work done on the ground by which you could identify a survey. (Rec., p. 33.) There is no evidence in the record to the contrary, and this view is corroborated by similar acts of the Texas legislature. (Laws, 1879, p. 10, sec. 8, and Laws, 1881, p. 66, sec. 16.) Duncan testified, and was not contradicted, that he superintended the surveys and employed to do the work the surveyor and his deputies, the entire surveying force, numbering between 20 or 30 people altogether. (Rec., p. 34.) The law, Tex. Rev. Stat., 1879, Art. 3853, authorized special deputies to assist the surveyor. There were then a number of surveying parties at work, between 6 and 10 different parties. The said blocks of 72 and 136 sections were described in the application by "metes and bounds, courses and distance." See allegation in plaintiff's petition (Rec., p. 2). Hence, there must have been a previous preliminary survey. The relative location in said blocks of the sections to each other—that is, the geometrical outlines of each block—is not in the record, and hence we may take that form easiest to be surveyed. (Corinne Company *v.* Johnson, 156 U. S. 574). If the smaller block was 6 sections wide and 12 sections long it could have been surveyed, fixing two corners to each section, by running 41 miles. Two surveying parties then, by surveying $20\frac{1}{2}$ miles each, could have done this work. Maddox, however, surveyed in one day 28 miles. So, if the larger block of 136 sections was 10 wide and $13\frac{1}{2}$ long, it could have been similarly surveyed by running $75\frac{1}{2}$ miles. Four surveying parties, then, by surveying less than 19 miles each, could have

done this work. This would require 6 surveying parties to survey the two blocks, and as it only requires 3 persons to survey, and there were between 20 and 30 persons engaged in the work, it was not only not physically impossible to survey the land in the time stated, but was practicable and not even difficult, according to the testimony of Maddox, upon whom alone counsel depended to show that the surveys could not have been made on the ground.

The problem, however, above worked out as one way by which it was possible to make the surveys in the time stated, was a problem that no court should be required to submit to a jury, especially not at the request of a party who could have produced copies of the maps of the surveys, filed in the land office, showing the relative locations of each section.

It was directly decided by Chief Justice Marshall, 4 Cranch, 431, that evidence of the character of that given by Maddox could have no weight to invalidate a survey.

Chief Justice Marshall said :

> " The surveyor was a sworn officer. This is an attempt to invalidate " the evidence derived from his official return, by a particular fact which " has no relation to the cause before the court, and with which the par- " ties to this controversy have no connection."

But if there were merit in the contention of counsel for plaintiff in error, the question was not properly raised in the trial court. The charge asked by him and refused by the court was defective in not defining to the jury what, under the law, would be an office survey and what a survey in the field. Without instructions from the court on that material point, the jury could not properly have decided the issue. We understand the practice in the federal courts to be that a charge which is not correct may be rightfully refused by the trial judge. The charge in question reads :

"If the jury find from the evidence that any of the sections of land "described in plaintiff's petition were not actually surveyed on the "ground, then and in such case they are instructed that such surveys "are void, and for such sections plaintiff cannot recover: and if the "jury should find that none of said sections were actually surveyed on "the ground, then they are instructed to return a verdict for the "defendant."

But should we be wrong in the above contentions, still this court cannot go into the question whether the land was surveyed on the ground, because none of the bills of exception state that the record contains all the testimony that was introduced to show that the surveys were actually made. In Corinne Co. *v.* Johnson (156 U. S. 576) the court says:

"Now the defect in this record which is fatal to the case of the plain-"tiff in error is that nowhere is it shown that all the testimony received "on the trial is preserved. Under such circumstances we are not at "liberty to assume . . . that there was not testimony which con-"clusively established the existence of some one or more of those ex-"ceptions. . . . The presumptions are all in favor of the rulings of "the trial court."

Question by MR. JUSTICE FIELD:

Is it not true that Russ, when he made the contract, had no rights, and therefore could convey none?

Suppose, for an instant, this is true, still the contract was to convey such title as he then had or might thereafter acquire, and as the surveys were completed on the 9th of November and the conveyance of his title was not to be made until the 15th of November, he, on that date, did have, by virtue of the surveys, a vested right to complete the purchase. In Lamb *v.* Davenport (18 Wallace, 307) it is expressly decided that a contract concerning a title to be acquired in the future is valid as between the parties to the contract, though at the time of contract there are no rights as against the United States. So in

Richardson *v.* Washington (31 Southwestern Reporter, 614) the Texas supreme court announce the doctrine that a contract concerning a right or title to be wholly acquired in the future is valid and enforceable. These cases completely answer this question.

Moreover, this question is raised by the assignment of error only as to the 98 sections surveyed after November 1, 1882. Hence the court will only consider the 98 sections of 640 acres each, aggregating 62,720 acres. The total number of acres involved under the charge and verdict was 1,144,320, and the verdict principal amount was $286,080; that is, at the rate of 25 cents per acre or the total amount claimed.

Therefore, even if the court should sustain the contention as to the 98 sections, the cases of Decatur Bank *v* St. Louis (21 Wallace, p. 294) and Walbrun *v.* Babbitt (16 Wall., p. 577) decide that the court will not reverse but will reform the verdict by deducting the 98 sections at 25 cents an acre and interest thereon.

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The 98 sections would amount to $15,680, and the interest on this amount at 8% to July 12, 1891, and at 6% from July 12, 1891, to July 12, 1893, would be $12,739,059.

This would leave the principal reformed verdict $270,400, and the total reformed verdict, including interest, would be $501,528.16.

Question by Mr. Justice Field:

Were the field-notes returned in time?

We think the arguments in our brief answer this question. But if they do not, then it is immaterial, as the failure to file them in time was no ground of forfeiture (New York L. Co. *v.* Gardiner, 32 S.W. Rep. 786), and was so treated by the land officials who issued patents on 25 sections.

We insist that the question as to Bacarrisse's agency is not before this court. The assignment of error in the circuit court of appeals was to the point that under the pleadings no evidence that Bacarrisse received his authority through Wescott was admissible, and that there should have been no charge to the jury as to Wescott's agency. In defendant's answer that issue was raised and hence the evidence and charge were proper. This point was fully discussed and Texas authorities cited in the argument before the circuit court of appeals. Counsel for plaintiff in error was satisfied with the ruling on that point in that court and does not present it here. He stated in his oral argument in this court that he does not rely upon it. The judgment should be affirmed.

JOSEPH WHEELER,
CLARENCE H. MILLER,
Counsel for Geo. W. Russ.

FILED.
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Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 462.

COUNT JOSEPH TELFENER, PLAINTIFF IN ERROR,

vs.

GEORGE W. RUSS, DEFENDANT IN ERROR.

Reply by J. L. Peeler, Counsel for Count Joseph Telfener, to the Answers and Argument of Hons. Joseph Wheeler and Clarence H. Miller, Counsel for George W. Russ, filed March 6, 1896.

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I regret extremely that I should be called upon to respond to the very remarkable document referred to, and now apologize to the Court for my second appearance. The distinguished counsel for Russ have on three different occasions filed briefs in this cause; twice it has been argued, and following each submission they have asked and obtained leave to rebrief the record. "Drowning men grab at straws," and their last effort proves that they now know as little about the questions involved as they did at first.

From page 1 of Messrs. Wheeler and Miller's brief I quote:

"Is not the judgment a very large one? What did Russ lose that he should recover such an amount?"

Very thoughtful of Mr. Justice Brown to ask what Russ lost. We answer, Nothing. The Court will note that Russ had 3 months to survey the land after the applications were filed; he had 60 days to return the field-notes and map to the General Land Office after the surveys were made, and he then had 60 days to pay for the land. The field-notes were returned to the General Land Office January 8, 1883, and the 60 days in which to pay for the land did not expire until March 8, 1883. The contract is alleged to have been made November 1, 1882, and the date of the breach 15 days thereafter. Russ possessed on the date of the breach, November 15, 1882, all the rights in these lands that he had on the first of that month, and he continued to possess such rights for 3 months and 23 days thereafter; yet, notwithstanding this great length of time, from his standpoint his interest in these lands on November 1, 1882, was worth 25 cents per acre, and 15 days thereafter nothing. By an examination of his bill it will be seen that he sued to recover 25 cents per acre, the contract price, and that he recovered the full amount of it, thereby showing that his interest on November 15 was absolutely valueless. Now, is this not rather remarkable, and still more so that Russ should appeal to this Court, both by oral and printed arguments, to affirm a judgment for about a half million dollars—a judgment representing a worthless interest, a piece of moonshine?

We maintain in all seriousness that the only thing Russ can recover is a sum sufficient to make him whole, such as will protect him from actual loss. It is possible that Russ expended a few hundred dollars to acquire the "office field-

notes" about which so much has been said, and whatever they cost him he is probably entitled to recover.

To illustrate:

Suppose that A owns a stock of goods, and that B has possession of and is selling the same to the general public. B is insolvent, and one of his creditors believes that he is simply using A's name to defraud his creditors, and attaches the stock, alleging that B is the real owner of the goods, and that they are subject to his debts. The stock is sold at sheriff's sale soon afterward, and A buys it in for three thousand dollars. Immediately afterward A sues the attaching creditor for fifteen thousand dollars, that sum being the real market value of the goods at the time and place of attachment. Now, what is A entitled to recover? It only cost him three thousand dollars to regain possession of his goods. Some courts have held that he would be entitled to recover the market value of the goods; but by an examination of the authorities it will be seen that these cases are greatly in the minority, and it was only the other day that the supreme court of Texas announced the doctrine that A could only recover three thousand dollars, a sum sufficient to protect him from actual loss only, and in doing so that eminent court overruled a number of its own decisions and threw itself in line with the great weight of authority.

In other words, may it please your Honors, the measure of damages in this case ought to be the difference in the market value of Russ' interest on the 1st and 15th of November, 1882, the dates of the contract and breach. If there was no difference, and there was none during these fifteen days, then we ask what justice would award him one-half million dollars?

On November 15 he possessed every right he had on the 1st, and continued to do so for several months thereafter; but the fact of the matter is, he owned nothing, sold nothing, and is entitled to nothing.

On page 9 of the brief of these gentlemen I find the following:

"*Does the reference in section 3 to reponsible parties have any bearing upon the right of assignment?*"

We answer, It does. The law of 1879 permitted only "responsible parties" to apply for lands, and if a person was not responsible he could not apply, nor could an assignment be made to him, because a person cannot do indirectly what the law will not permit him to do directly.

We contend that Russ' interest in these lands was personal—one that would end when he died, such as could not be inherited, an interest that could not be conveyed or assigned in any manner—and we are borne out in this conclusion by the act of 1879. Section 5 provides that it shall be the right of the *person*, *firm*, or *corporation* who has had the land surveyed to pay into the Treasury the purchase-money, and the Commissioner shall issue to *such person*, *firm*, or *corporation* a patent for the land. This law, from beginning to end, nowhere uses the word "assigns," but upon its face confers rights only upon the party causing the land to be surveyed, himself and not assigns. The act provides that this party must be responsible, and that if he does not pay the money within the sixty days he shall forfeit all rights and shall not thereafter be allowed to purchase the land. Who is entitled to a patent? Why, the *party* causing the land to be surveyed. To whom does the forfeiture refer? The act says the *party* who had caused the land to be surveyed and who had failed to pay for it. Telfener was not an applicant, nor had he caused any land to be surveyed, nor could the forfeiture apply to him. The law did not know Telfener; it did not recognize or confer upon him or any assign any right whatever; nor could Russ do what the law could not.

There never was but one act passed by the Republic or State of Texas which was construed to authorize an assign-

ment, and that is the act referred to in the case of Graham *vs.* Henry, 17 Tex., 164. This act was passed by the Republic of Texas December 29, 1837, and amended January 4, 1839. The Secretary of the Interior construed the act to authorize assignments, and the Court adopted such construction; but just as soon as the Secretary's ruling was made known, Congress amended the law, expressly prohibiting any transfer whatever.

Take the desert-land and timber-culture acts of Congress and they are similar in many respects to the law we are considering. The Secretary of the Interior construed both of these acts of Congress as not authorizing a transfer, and his ruling as to the desert-land act continued in force until 1891, when Congress amended the law, specially authorizing transfers; but the timber-culture act has never been amended, and today rights acquired under that act cannot be transferred.

If the legislature of Texas had intended transfers to be made under the act of 1879, they could have easily said so, and the word "assigns" would have appeared in the different sections. Why, if assignments could have been made, one responsible person could have applied for the survey of the entire public domain and had the lands surveyed, and then have said to the hundreds of would-be purchasers, "Pay to me so much and I will assign to you all the lands you desire." The legislature did not intend that speculators should file on these lands, but only such persons, firms, or corporations as would cause the lands to be surveyed and would pay the fifty cents per acre.

Further quoting from Messrs. Wheeler and Miller's brief, I find on page 10:

"*Was it not a physical impossibility that the land was surveyed on the ground in the time stated?*"

We answer, Yes. The testimony clearly shows that between October 13 and November 9, 1882, there were 1,813 sections of

land surveyed, consisting of 1,160,320 acres, and covering the vast distance of 7,252 miles. Article 3908 of the Revised Statutes of Texas (1879) expressly required the field-notes of every survey to be signed by the surveyor making the same, and it was admitted by counsel for Russ upon the trial of this case that the 1,813 sets of field-notes were signed by A. M. Randolph (Trans., p. 34); besides, it is further shown by the certificate of the Commissioner of the General Land Office that all the surveys purport to have been made by Randolph and no one else (Trans., p. 30). Now, how did Randolph make these surveys? We answer, In his office, at his desk, and not upon the ground, as required by law. It was a physical impossibility for Randolph to have surveyed these lands in the field, because he would have had to travel 268 miles each day. As to this question, there is no escape for Russ. The law (Art. 3908, R. S. Tex., 1879) required the surveyor, who had gone upon the ground with his chain-carriers and actually surveyed the land, to sign the field-notes—he, and nobody else. If a deputy marshal should sell real estate under an execution, he, and not his chief, would have to acknowledge the deed; or if a deputy clerk should take an acknowledgment to an instrument, he, and not his principal, would have to make the certificate; and just so the surveyor, whether chief or deputy, making surveys in Texas had to sign the field-notes. Russ contends that surveying one line and making one corner is a valid survey. How absurd is this contention! If a line is not run, how could you have field-notes for or know its distance? If no corner had been made, how could you call for it? With only one side surveyed and one corner made, how would the field-notes close? But why continue this discussion? Maddox, the only surveyor who testified, said that these surveys were not made on the ground; besides, the record shows that it was a physical impossibility for Randolph to have made them in the field, and if there were no surveys made on the ground, they were

void, and, being void, the matter stood as if no surveys had ever been made.

Bacon *et al. vs.* The State, 21 S. W. Rep., 149.

From page 15 of the brief of Russ we quote:

"*Were the field-notes returned in time?*"

We answer, No. All the sections were surveyed by November 3, 1882, except twenty-four, and the field-notes were returned to the General Land Office on January 8, 1883, after the 60 days had expired in which to file them. Section 3 is mandatory, and unless the field-notes were filed within the 60 days after the survey, how could any right accrue? Until the field-notes were returned to the General Land Office, it could not be determined that there had been any survey. The case of New York L. Company *vs.* Gardiner, 32 S. W. Rep., 786, is not applicable. It simply construes the act of 1887 concerning the rights of actual settlers. It will be noted that there is a vast difference between the act of 1887 and that of 1879; besides, in the case cited vested rights had accrued and valuable improvements had been made; but even in that case the court said, "It follows that by taking actual possession of the State's land cannot deprive others of the right to settle thereon," thereby not recognizing the rights of the first applicant.

There are several other questions presented and discussed in the last brief of the eminent counsel for Russ, but we will not notice them, having too much respect for this Court to trespass longer upon its time.

J. L. PEELER,
Counsel for Count Joseph Telfener.